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NO._____

in the United States Supreme Court

1984 Term

KATHY DUNAGIN, ET AL., *Petitioner,*

versus

CITY OF OXFORD, MISSISSIPPI, ET AL. *Respondent*

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition presents for review the following questions:

(1) Whether the Mississippi statute prohibiting the advertisement of liquor in counties in which its sale is entirely legal is a constitutionally permissible restraint of commercial speech.

(2) Were the Petitioners deprived of their First Amendment right to freedom of speech by the statute prohibiting liquor advertisement as it was applied to them?

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CITATION TO THE OPINION BELOW

The decision sought to be reviewed is that of the United States Court of Appeals for the Fifth Circuit in Dunagin v. City of Oxford, 718 F.2D 738 (5th Cir. 1983), a copy of which is set forth fully in the Appendix.

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §1254 (1) (1976). The opinion and judgment sought to be reviewed were issued and entered on October 31, 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of MISS. CODE ANN. § 97-31-1 (1972) is as follows:

> It shall be unlawful for any person, firm, corporation or association, or any servant, official or employee thereof, (1) to advertise upon any street car, railroad car, or other vehicle of transportation, or at any public place or resort, or upon any sign or billboard, or by circulars, poster, price lists, newspapers, periodicals, or otherwise, within this state, alcoholic, intoxicating or spirituous liqours, or intoxicating bitters or other drinks which if drunk to excess, will produce intoxication, including among others, brandy, whisky, rum, gin, ale and porter, or to advertise the manufacture, sale, keeping for sale or furnishing of any of them, or the person from whom, or the firm or corporation from which, or the place where, or the method by which same, or any of them, may be obtained; (2) to circulate, publish, sell, offer for sale, or expose for sale, any

newspaper, periodical, or other written printed matter in which any advertisement specified in this section shall appear, or to permit any sign or billboard containing such advertisement to remain upon one's premises; or (3) to circulate any price list, order blanks, or other matter, for the purpose of inducing or securing orders for said liquors, bitters, and drinks, or any of them hereinbefore mentioned, no matter where located. Any sheriff, constable, or other police officer, is authorized to remove any such advertisement from any sign, billboard or other public place, when it comes to his notice, and shall do so upon demand of any citizen. Any advertisement or notice containing the picture of a distillery, bottle, keg, barrel or box, or other receptacle represented as containing any liquors, bitters or drinks mentioned or designed to serve as an advertisement thereof, shall be within the inhibition of this section.

The First Amendment to the United States Constitution is as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 2 of the Twenty-First Amendment to the United States Constitution is as follows:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

STATEMENT OF THE CASE

The Petitioners in this case are the editor and business manager of the Daily Mississippian, a student-operated newspaper at the University of Mississippi. On April 1, 1979, they received from Gerald Gafford, as attorney for Respondent City of Oxford, a letter dated March 29, 1979. The letter threatened legal action, presumably pursuant to Mississippi Code Annotated §97-31-1 (1972) which prohibits advertisements for the sale of liquor, if the Daily Mississippian did not cease its practice of running advertisements for the sale of beer. Members of the police force of the City of Oxford also physically visited the offices of the Daily Mississippian and ordered the

students to cease publication of the beer advertisements. The Petitioners responded by filing suit in the United States District Court for the Northern District of Mississippi on June 7, 1979, seeking injunctive relief against the City, a declaration that the statute was unconstitutional, certification as a class action, and attorney's fees pursuant to 42 U.S.C. §1988. The Petitioners invoked the court's jurisdiction under 28 U.S.C. §§ 1331 and 1343(3) for a case of action under 42 U.S.C. § 1983.

On June 27, 1979, the State of Mississippi moved to intervene as a Defendant; this motion was granted on June 29, 1979. Also on June 29th, the City of Oxford stipulated ex parte that it would not instigate legal proceedings

pending the outcome of the district court action.

On July 3, 1979, the City of Oxford filed its Answer in which it stood by its position that §97-31-1 prohibits beer advertisements. The State of Mississippi, however, contended that the statute did not prohibit beer advertisements and on that basis claimed that there was no case or controversy and moved for dismissal. The court granted this motion on January 10, 1980, although Petitioners were allowed to amend their Complaint to specifically allege on intent to challenge the statute as it prohibited advertisements for liquor other than beer. The amended complaint was filed on January 23, 1980.

On February 27, 1980, the court granted Petitioners' motion for class certification and certified a plaintiff

class of all past, present, and future students elected or appointed to an editiorial or business manager's position with the Daily Mississippian. On May 2, 1980, the United States District Court for the Northern District of Mississippi entered Summary Judgment for the Respondents, declaring the attacked statute to be constitutionally valid. From this order and the previous order dismissing the suit for lack of case or controversy, and the order denying Petitioners an award of attorney's fees, the Petitioners appealed to the United States Court of Appeals for the Fifth Circuit. On rehearing en banc the Fifth Circuit held that the Mississippi law that bans liquor advertising by local, in-state media is not in violation of First Amendment protection of commercial speech because the view that there is

reason to believe that advertising and consumption are linked is sufficient to justify a ban.

ARGUMENTS

The First Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment, expressly states that freedom of speech shall not be abridged. Within the ambit of this protection is commercial speech, which at least "concern[s] lawful activity and [is] not misleading." Central Hudson Gas & Electric Co. v. Public Service Commission of New York, 447 U.S. 557, 566 (1980). The First Amendment protects commercial speech because the free flow of commercial information is indispensable to the public interest. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 763-65 (1976). See also First National Bank v.

Bellotti, 435 U.S. 765, 783 (1978). Even though commercial speech might be remotely related to, or even "tend to promote" activity that is arguably illegal, it nevertheless cannot be prohibited if it does nothing more than propose a commercial transaction that itself is legal. Carey v. Population Services International, 431 U.S. 678, 701 (1977).

Included within the First Amendment protection of commercial speech is advertising and display of concretely truthful information about entirely legal activity. Id. at 700. If advertisements propose nothing more than an entirely legal transaction they are constitutionally protected and may not be suppressed by the state. Virginia State Board of Pharmacy, Supra, 425 U.S. at 773. The constitutional question

concerning commercial advertisements is not whether the "underlying product" is regulated or even illegal in some areas, but whether the "transactions proposed" by the advertisements are legal. Id. at 772; Central Hudson Gas, 447 U.S. at 574. The state has no valid interest in "discouraging purchasing of the underlying product." Central Hudson Gas & Electric Co., supra, 447 U.S. at 574.

Time, place, and manner restrictions may be placed on commercial speech provided they are justified without reference to the content of the regulated speech, they serve a significant government interest, and that in doing so they leave open ample alternative channels for communication of the information. Virginia State Board of Pharmacy, 425 U.S. at 770-71. The regulation, however, may not take the

form of a complete ban. Id.; California v. La Rue, 409 U.S. 109, 118 (1972).

One of the most recent decisions of the Supreme Court in the area of commercial speech, and the one relied upon by the Fifth Circuit in the instant case is Central Hudson Gas & Electric Co. v. Public Service Commission of New York, supra. Under Central Hudson's four-part analysis the constitionality of a commercial speech restriction is determined by: (1) whether the speech concerns lawful activity and is not misleading, (2) whether the asserted governmental interest is substantial, (3) whether the regulation advances the asserted governmental interest, and (4) whether the regulation is more extensive than necessary to advance that interest. 447 U.S. at 566.

In the case presently under review, the advertisements propose only a transaction that is entirely legal. Under Mississippi's local option law, see MISS. CODE ANN. §67-1-1 et seq. (1972 & Supp. 1983), the City of Oxford has chosen to allow the sale of liquor within the City. The proposed advertisements in question would propose the sale of liquor, which is entirely legal in the City of Oxford, the area in which the Petitioners' newspaper is published and generally circulated. The Mississippi statute prohibiting liquor advertisements makes no distinction between advertisements that are misleading and those that are not, but bans all advertisements both truthful and deceptive. Because liquor advertisements themselves are not inherently misleading, the Petitioners

have satisfied the first requirement of the Central Hudson test.

To meet the second part of the Central Hudson test the State alleges that its substantial interest is the "safeguarding [of] the health, safety and general welfare of its citizens by controlling the artificial stimulation of liquor sales and consumption created by the advertising of liquor." Dunagin v. City of Oxford, 718 F.2d 738, 747 (5th Cir. 1983). The Petitioners contend that this is not a valid interest under the Court's mandate in Virginia State Board of Pharmacy and Central Hudson. Assuming, however, the State has a substantial interest in preventing the artificial stimulation of liquor consumption, it has not proven that the proposed advertisements would promote such consumption. It does not follow a priori

that advertisements for the sale of liquor in areas where it is legally permissible will necessarily result in the artificial stimulation of alcohol consumption. The argument that advertisements would not be placed if consumption was not stimulated is untenable in the instant case because the Petitioners have no interest at all in promoting the sale of alcoholic beverages; rather they are only interested in defending their control over the content of their newspaper against intrusions upon their discretion by the statute at issue.

Although assurance that the local option law is enforced would be a valid governmental interest, the State has no valid interest in "discouraging purchasing of the underlying product." Central Hudson Gas & Electric Co., supra, 447 U.S. at 574. The State's interest

clearly is not against consumption of liquor because the State legislature itself passed the local option law expressly giving each respective county the right to permit the sale and consumption of liquor. The Fifth Circuit, in effect, has determined that the harmful potential of liquor consumption derogates the Petitioners' constitutional rights even though the State legislature has elected to permit each county to determine for itself the harmfulness vel non of liquor.

Even if the State's interest against the artificial stimulation of liquor consumption is valid and substantial, the means employed to promote that interest are impermissible. Mississippi may strictly regulate the sale of liquor in wet counties and enforce the local option law in dry counties, but

keeping the public in ignorance of the terms offered by a properly licensed retail liquor establishment is not a valid means of advancing that interest. Under the third element of the Central Hudson test, there must be a direct causal link between the proposed advertisements and violations of the local option law. 447 U.S. at 566. Such a link is not proven in the instant case.

Central Hudson also requires the State to demonstrate that it could not achieve the same result by a less restrictive measure. 447 U.S. at 566. Mississippi could have imposed time, place, and manner restrictions on liquor advertisements, but instead it has forbidden liquor advertisements across the board and has left no alternative means of communication. The Twenty-First Amendment does not relieve the State from

proving this important element of the Central Hudson test. See California v. La Rue, 409 U.S. 109, 118 (1972) ("critical fact is that California has not forbidden these performances across the board").

The Fifth Circuit erroneously altered the Central Hudson review standard because of the Twenty-First Amendment, concluding "the validity of a state statute regulating liquor does not proceed via the traditional route for testing the constitutionality of state statutes." Dunagin v. City of Oxford, 718 F.2d at 744. To the contrary, the Twenty-First Amendment does not give states the power to change the review standard when the regulation of liquor is at issue. See Craig v. Boren, 429 U.S. 190, 206-07 (1976) (review standard not changed when liquor statute

challenged on equal protection grounds). The purpose of the Twenty-First Amendment was to give the states power to control intoxicating liquor as opposed to the power of the federal government. "It had nothing whatsoever to do with encroachment upon the individual liberties protected in the Constitution." Dunagin v. City of Oxford, 718 F.2d at 754 (Williams J., specially concurring). See also Craig v. Boren, 429 U.S. at 206 (history of Twenty-First Amendment does not suggest it qualifies Bill of Rights). The power to control the production, sale, advertising and consumption of alcohol lies in the area of "police power" and does not depend upon the Twenty-First Amendment. Dunagin v. City of Oxford, 718 F.2d at 754 (Williams J., specially concurring).

Although it is not entirely clear whether the suppression of commercial information is subject to strict scrutiny review, see Central Hudson, 447 U.S. at 577 (Blackmun J., concurring) (citing Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977)), or a somewhat lesser standard, it is clear that the review standard is heightened and is greater than the deferential standard applied in this case by the Fifth Circuit. In addition, there are more serious First Amendment overtones when the case concerns constitutional limitations on intrusions into the editorial discretion of newspaper publishers and editors, thereby further supporting the application of a heightened standard of constitutional review. See Bigelow v. Virginia, 421 U.S. 809, 828 (1975).

The Mississippi statute totally prohibiting the advertisement of liquor is in direct violation of the First Amendment to the Constitution. Even if the statute were constitutionally valid, however, the application of the statute to the Petitioners is unconstitutional. The attorney for the City of Oxford threatened legal action against the Petitioners for publication of advertisements for the sale of beer, although such advertisements were clearly permitted by statute. By this conduct, the City unconstitutionally chilled the First Amendment rights of the Petitioners although they knew or could have easily discovered that the Mississippi statute did not prohibit advertisements for the sale of beer. In effect, the Fifth Circuit allowed the City of Oxford to threaten its citizens with legal action and deprive

them of their constitutional rights by applying a prohibitive statute to an unquestionably lawful activity and then allowed the City to absolve itself of liability ex post facto by admitting that it indeed did misapply the statute at issue.

Because of this unauthorized state action the Petitioners' constitutional right to exercise their editorial discretion in the publication of their newspaper was violated. The Petitioners thus were parties who, under color of state action, were deprived "of rights, privileges, or immunities secured by the Constitution and laws" of the United States and are entitled to an award of attorney's fees pursuant to 42 U.S.C. §1988.

CONCLUSION

For all of the foregoing reasons, and because the United States Supreme Court has already granted certiorari in Oklahoma Telecasters Association v. Crisp, 699 F.2d 490 (10th Cir. 1983) cert. granted sub nom. Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 66 (1983), which involves substantially similar issues, certiorari should issue to review the

decision of the Fifth Circuit in this case.

Respectfullly submitted,

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BY
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APPENDIX

Kathy DUNAGIN, et al.,
Plaintiffs-Appellants,

v.

The CITY OF OXFORD, MISSISSIPPI,
et al., Defendants-Appellees,

The State of Mississippi,
Intervenor-Appellee.

LAMAR OUTDOOR ADVERTISING,
INC., et al., Plaintiffs-Appellees,

v.

MISSISSIPPI STATE TAX COMMIS-
SION, et al., Defendants-Appellants.

Nos. 80-3762, 82-4076.

United States Court of Appeals,
Fifth Circuit.

October 31, 1983.

Actions were brought against the Mississippi State Tax Commission, individual commissioners thereof, Commission's Alcoholic Beverage Control Division, and State Attorney General by outdoor advertising, newspaper, television and radio businesses that operate in Mississippi seeking

declaratory judgments that Mississippi's intrastate liquor advertising ban unconstitutionally abridged their commercial speech rights and asking for an injunction against enforcement of ban. The United States District Courts for the Northern District of Mississippi and the Southern District of Mississippi, 539 F.Supp. 817, split on the issue. On rehearing, ordered at 701 F.2d 335, of panel opinion, 701 F.2d 314, the Court of Appeals, Reavley, Circuit Judge, held that Mississippi law which banned liquor advertising by local, in-state media is not in violation of First Amendment protection of commercial speech in view of existence of sufficient reason to believe that advertising and consumption are linked to justify ban, whether or not "concrete scientific evidence" exists to that effect.

Judgment of District Court for the Northern District of Mississippi affirmed, judgment of District Court for the Southern District of Mississippi, 539 F.Supp. 817, reversed.

Jerre S. Williams, Circuit Judge, specially concurred and filed an opinion in which Tate, Circuit Judge, joined.

Gee, Circuit Judge, dissented and filed an opinion in which Goldberg, Politz, Randall, and Patrick E. Higginbotham, Circuit Judges, joined.

Patrick E. Higginbotham, Circuit Judge, filed opinion concurring in dissenting opinion of Gee, Circuit Judge.

1. Constitutional Law 90.1(1)
Intoxicating Liquors 15

Mississippi law which banned liquor advertising by local, in-state media is not in violation of First Amendment protection of commercial speech in view

of existence of sufficient reason to believe that advertising and consumption are linked to justify ban, whether or not "concrete scientific evidence" exists to that effect. Miss. Code 1972, §§ 67-1-37(e), 67-1-85.

2. Constitutional Law 90.1(1)
Intoxicating Liquors 15

Mississippi's ban on liquor advertising by local, in-state media was no broader than necessary to pursue its goal of preventing artificial stimulation and promotion of liquor sales and consumption, and, as such, did not violate First Amendment protection of commercial speech. U.S.C.A. Const. Amend. 1; Miss. Code 1972, §§ 67-1-37(e), 67-1-85.

3. Constitutional Law 239(1)

Strict scrutiny standard of review was inappropriate to review of

constitutionality of Mississippi's ban on liquor advertising by local, in-state media under the equal protection clause of the Fourteenth Amendment on mere assertion of violation of First Amendment rights where Mississippi law was ultimately found to be unconstitutional restriction of commercial speech. U.S.C.A. Const. Amends. 1, 14; Miss. Code 1972, §§ 67-1-37(e), 67-1-85.

4. Constitutional Law 239(1)
Intoxicating Liquors 15

Disadvantage to which economic interests of intrastate liquor advertisers were put by Mississippi law banning liquor advertising by local, in-state media compared with those of interstate media gave rise to an equal protection issue requiring only minimal scrutiny and, under such deferential scrutiny of economic regulations,

challenged classification did not violate equal protection clause of the Fourteenth Amendment. U.S.C.A. Const. Amends. 1, 14; Miss. Code 1972, §§ 67-1-37(e), 67-1-85.

Appeal from the United States District Court for the Northern District of Mississippi.

Appeal from the United States District Court for the Southern District of Mississippi.

Before CLARK, Chief Judge, BROWN, GOLDBERG, GEE, REAVLEY, POLITZ, RANDALL, TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY and HIGGINBOTHAM, Circuit Judges.*

REAVLEY, Circuit Judge:

Mississippi is one of several states which significantly restrict liquor

*Judge Alvin B. Rubin recused himself and did not participate in this decision.

advertising by the local media.[1] Two suits were filed attacking, principally on First Amendment grounds, the Mississippi law. The District Courts for the Northern and Southern Districts of Mississippi reached opposite judgments in those cases. Dunagin v. City of Oxford, 489 F.Supp. 763 (N.D. Miss. 1980) (upholding); Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Commission, 539 F.Supp. 817 (S.D. Miss. 1982)

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1. See Fla. Stat. Ann. § 561.42(10)-(12) (West Supp. 1983); Mass. Gen. Laws Ann. ch. 138, §24 (West 1974); Utah Code Ann. §§ 32-7-26 to 28 (1953 & Supp. 1981); Okla. Const. art. XXVII, § 5 and Okla. Stat. Ann. tit. 37, § 516 (West Supp. 1982).

(invalidating).[2] We uphold the constitutionality of the Mississippi law.

I. The Mississippi Law

Until 1966 the possession and sale of alcohol were banned in Mississippi. The state then accepted the impossibility of enforcement of total prohibition and enacted a local option law, allowing each county or judicial district therein to vote an end to the prohibition that

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2.A panel of this court heard the consolidated appeal and decided the law was unconstitutional. Before delivery of that opinion, however, the 10th Circuit upheld the Oklahoma law in Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490 (10th Cir. 1983), petition for cert. filed, 51 U.S.L.W. 3863 (May 3, 1983). Under the procedure of this circuit governing when a panel proposes to issue a decision that initiates a conflict with another circuit, the proposed opinion was first circulated to all active judges of this court. An en banc poll was requested, and the case was voted en banc. The panel opinion was then published, though vacated: 701 F.2d 314, 335.

otherwise continues throughout the state. Miss. Code Ann. §§ 67-1-1 et seq (1973). Mississippi did not drop its objection to intoxicants by enacting the 1966 law; it reannounced the state policy of prohibition while allowing local exceptions under strict regulation:

> The policy of this state is reannounced in favor of prohibition of the manufacture, sale, distribution, possession and transportation of intoxicating liquor.... The purpose and intent of this chapter is to vigorously enforce the prohibition laws throughout the state, except in those counties voting themselves out from under the prohibition law in accordance with the provisions of this chapter, and, in those counties, to require strict regulation and supervision of the manufacture, sale, distribution, possession and transportation of intoxicating liquor....

Id. § 67-1-3. At the time of trial in Lamar Outdoor Advertising, thirty-five counties and four judicial districts remained "dry," while forty-three counties and four judicial districts had

voted to legalize liquor. The wet and dry counties are spread across the state in a checkerboard pattern, with the majority of the population residing in wet counties.

Pursuant to its rulemaking authority granted by the local option law, id. § 67-1-37(e), the Mississippi State Tax Commission promulgated Regulation No. 6, which prohibits most advertisements that

"originate" within the state.[3] The plaintiffs challenged this regulation,

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3.The regulation provides:

No person, firm or corporation shall originate advertisement in this State, dealing with alcoholic beverages by any means whatsoever, including but not limited to newspapers, radio, television, circular, dodger, word of mouth, signs, billboards, displays or any other advertising media, except as follows:

(1) On the front of any licensed retail package store building, and no higher than the top of the roof of the permitted place of business at its highest point, there may be printed without illumination, in letters not more than eight (8) inches high, the name of the business, the permit number thereof, which may be preceded by the words "A.B.C. Permit No. ____", and the words "Package Liquor Sold Here". Where the package retail store is located in a building of more than one story in height, the top of such sign shall not be higher than the top of the first story.

(2) A package retail permittee may advertise merchandise inside the permitted place of business by means of a display or displays, signs or placards, or notices, without special illumination. No displays, signs, placards or notices will be permitted in windows. No displays, signs, placards, notices, shelves, counters, or other fixtures shall be constructed

as well as Miss. Code Ann. §§ 67-1-85 (1973) which prohibits most forms of

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(CONT.)or arranged in such a manner as to attract attention from outside the building.

(3) The holder of an on-premises retailer's permit may use the word "lounge", or other similar words descriptive of the facilities available at the permitee's principal place of business, in letters not more than eight (8) inches high and without special illumination, on signs located on the permittee's premises. The use of the word "lounge", but no other words of a similar nature, will be permitted on billboards in letters not more than eight (8) inches high.

(4) In other advertising media, an on-premises permittee may use the word "lounge", but no other words of a similar nature, including, specifically, but not limited to "cocktails", "bar", and "happy hour". The word "lounge" must be subordinated by restaurants to advertising placed for the other facilities offered at the place of business.

(5) All advertising not specifically permitted by statute or regulation is prohibited. Advertising of any type whatsoever about which a permittee may be in doubt should be submitted to the State Tax Commission for approval.

liquor sign advertising as well.[4]

4.The statute provided:

No holder of a package retailer's permit shall have any sign, lighted or otherwise, or printing upon the outside of the premises covered by his permit advertising, announcing or advising of the sale of alcoholic beverages in or on said premises. However, on the front of said premises there may be printed, in letters not more than eight (8) inches high, the name of the business, the permit number thereof, which may be preceded by the words "A.B.C. Permit No.." and the words "Package Liquors Sold Here." In addition, no alcoholic beverages, price list or promotional matter shall be kept, stored or displayed in the windows or other openings of said premises. An open window space or spaces not exceeding sixty square feet in area in the aggregate, and an open space of not exceeding twenty square feet in a front door, may be left open to view. The commission shall have the power and authority to adopt and enforce reasonable rules and regulations to compel compliance with the provisions of this section. It shall be unlawful to advertise alcoholic beverages by means of signs, billboards, or displays on or along any road, highway, street, or building. This section shall not be construed so as to prohibit the commission from

The combined effect of Regulation No. 6 and section 67-1-85 is that there are no billboards advertising hard liquor or wine in Mississippi. Local newspapers printed and distributed within the state are similarly restricted. Radio and television stations operating within the state cannot carry wine commercials, and must delete such advertisements from incoming network programming.

(CONT.)promulgating rules and regulations permitting the holder of an on-premises retailer's permit to include in signs located on the holder's premises and in advertisements of the holder's principal business, the word "lounge" or other similar words descriptive of the facilities available at such principal place of business, without referring specifically to alcoholic beverages.
Another statute banning liquor advertisements, Miss. Code Ann. § 97-31-1 (1972), is limited in scope to the provisions of the 1966 local option law, as explained in the panel opinion. 701 F.2d at 317.

There are some exceptions to this ban upon the advertising of alcoholic beverages. Beer advertisements are generally allowed in all media.[5] A retail package store is allowed under Regulation No. 6 to erect on-site signs with the message "Package Liquor Sold Here" along with its permit number, and may advertise inside the premises. Bars and restaurants can use the word "lounge" on signs and in other media.

5.As the district court in Dunagin explained, section 97-31-1 was amended in 1934 to allow such advertisements. 489 F. Supp. at 767 n. 4. While only light beer and wines of less than four percent alcohol by weight are expressly exempted from regulation, see sections 67-1-5(a), 67-3-5, the record indicates that brand name beer is generally advertised in Mississippi. Native wines can also now be advertised on billboards, except as to price, under an express exception in section 67-1-85. This exception became effective in July, 1982, after the district court decisions in this case, and does not color our analysis today.

The state has interpreted its law to mean that advertisements must originate within the state to be subject to its regulation. Hence, television and radio stations in other states broadcast liquor commercials that reach in-state viewers and listeners. Newspapers and magazines containing liquor advertisements from other states are mailed into the state, and newsstands in Mississippi are allowed to sell such publications. The state has even taken the position that a publication printed in Mississippi but mailed for distribution in Mississippi from another state is not subject to regulation. The state has also interpreted federal regulations to prohibit it from interrupting or deleting wine commercials in cable television transmissions sent from outside the state. See 47 C.F.R. § 76.55 (1982).

II. The First Amendment and Liquor Regulation

Those challenging the advertising ban argue primarily that it violates the First Amendment. They contend that this advertising falls within that limited protection afforded pure commercial speech which does "no more than propose a commercial transaction," Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762, 96 S.CT. 1817, 1825, 48 L.Ed.2d 346 (1976) and which is "related solely to the economic interests of the speaker and its audience," Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 561, 100 S.Ct. 2343, 2348, 65 L.Ed.2d 341

(1980).[6]

A. The Scope of Commercial Speech Protection

While we need not so hold, there may be no First Amendment protection of purely commercial advertising of those products which the state could entirely proscribe.[7] Or, if by virtue of its police power the state may prohibit or severely limit a trade or conduct (e.g., prostitution, hand-guns, explosive devices, marijuana, pipes and paraphernalia designed to be used with

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6.For a thoughtful discussion of the commercial speech doctrine, see Jackson & Jeffries, Commercial Speech: Economic Due Process and the First Amendment, 65 Va.L.Rev. 1 (1979).

7.Justice Blackmun, however, has stated that "I seriously doubt whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to 'dampen' demand for or use of the product." Central Hudson Gas, supra, 447 U.S. at 574, 100 S.Ct. at 2355 (concurring).

illegal drugs), the state may be entitled to allow the trade but restrict the advertising without having to justify the restriction by balancing the state interest against the public interest in the commercial speech. The Court has not expressly excepted this category of advertising from commercial speech protection. It has excluded advertising of illegal activity from the protection. Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 388-389, 93 S.Ct. 2553, 2560, 37 L.Ed.2d 669 (1973). And restrictions on false, deceptive, and misleading commercial speech are permissible. Friedman v. Rogers, 440 U.S. 1, 9, 99 S.Ct. 887, 893, 59 L.Ed.2d 100 (1979). Thus far, the Court has written to place commercial speech under protection where "it at least concern[s] lawful activity

and [is] not...misleading." Central Hudson Gas, 447 U.S. at 566, 100 S.Ct. at 2351.

The Court may or may not choose to exclude from protection the truthful advertising of lawful trades or activities which the state has so great an interest in abating that they are subject to prohibition. It probably makes no difference, however, whether this category of advertising is treated as outside of commercial speech protection or whether the Central Hudson Gas four-part test, discussed below, is applied, because cases of this category likely present state interests which justify advertising restrictions that pass the latter test as a matter of law.

The state argues that liquor advertising is excluded from protection by the previous opinions of the Supreme

Court because that advertising does promote illegal activity and is inherently misleading. We do not agree with those contentions.

The illegality argument is based on the fact that nearly half of the counties in the state are dry, and the fact that even in the wet counties, the manufacture, sale and distribution of liquor are only legal in limited areas--municipalities, qualified resort areas and clubs, Miss. Code Ann. § 67-1-7 (1973)--and even consumption is banned in certain areas of wet counties, such as public schools and colleges, id, § 67-1-37(g). The state reasons that liquor advertising would therefore necessarily relate to unlawful activity. The district court in Dunigan agreed:

> The Local Option Law does not expressly forbid the advertising of

> alcoholic beverages in "dry" areas, but it is beyond peradventure that such advertising must contribute to and encourage violation of the statute. This is true whether or not the newspaper is circulated only in a "dry" county because advertisement of liquor is apt to encourage consumers in "dry" counties to violate the law by purchasing liquor in "wet" counties for transportation home. This factor is exacerbated in the case of The Daily Mississippian because its principal readers are university students, particularly mobile citizens who come to Oxford from all sections of Mississippi to attend school. Some students doubtless purchase liquor in Oxford to take with them when they return home or visit with friends or relatives in "dry" counties.
>
> Because liquor advertising promotes activity illegal in a substantial portion of Mississippi, we hold that the State may regulate The Daily Mississippian's advertising of it even to the point of an absolute ban.

489 F. Supp. at 771.

If Mississippi cannot prohibit advertising because of the general effect upon liquor consumption, the state will not be entitled to prohibit advertising simply because it might stimulate the thirst of a consumer to the point where

he elects to violate the local option law. The Mississippi laws under attack prohibit the advertisement of what may be done lawfully in Mississippi; those laws do not forbid the advertiser's promotion of violation of Mississippi law. The commercial speech doctrine would disappear if its protection ceased whenever the advertised product might be used illegally. Peanut butter advertising cannot be banned just because someone might someday throw a jar at the presidential motorcade.

The state then argues that liquor advertising is not protected because it is misleading: falsely identifying alcohol with "the good life" instead of disclosing the personal and social disasters it threatens, and particularly affecting the young and unsophisticated children in the public audience.

Again, if Mississippi cannot prohibit this advertising because of the strength of the state interest against liquor consumption, the state will have little success in preventing the advertising merely because it fails to tell the whole truth about its product. Nearly all advertising associates the promoted product with a positive or alluring lifestyle or famous or beautiful people. Our policy is to leave it to the public to cope for themselves with Madison Avenue panache and hard sells. A central teaching of the comercial speech doctrine was summed up in Central Hudson Gas:

> In applying the First Amendment to this area, we have rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. "[P]eople will perceive their own best interests if only they are well enough informed, and...the best means to that end is to open the channels of communication rather than to close them...." Even when advertising communicates only an incom

> plete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.

447 U.S. at 562, 100 S. Ct. at 2349 (citations omitted).

As for the argument that the advertising will reach young children, "the government may not 'reduce the adult population...to reading only what is fit for children.'" Bolger v. Youngs Drug Products Corp., __U.S.___,___, 103 S.Ct. 2875, 2884, 77 L.Ed.2d 469 (1983) (quoting Butler v. Michigan, 352 U.S. 380, 383, 77 S.Ct. 524, 525, 1 L.Ed.2d 412 (1957).

B. The Twenty-first Amendment

If there is any instance where a state can escape First Amendment constraint while prohibiting truthful advertising promoting lawful sales, it would be where the product being sold is intoxicating

liquor. Section two of the Twenty-first Amendment states:

> The transportation or importation into any state, territory, or possession of the United states for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

This clause serves primarily to create an exception to the normal operation of the Commerce Clause. Craig v. Boren, 429 U.S. 190, 206, 97 S.Ct. 451, 461, 50 L.Ed.2d 397 (1976). Its effect goes much further and is very significant to the case before us.

In Castlewood International Corp. v. Simon, 596 F.2d 638, 642 (5th Cir. 1979), vacated and remanded, 446 U.S. 949, 100 S.Ct. 2914, 64 L.Ed.2d 806 (1980), panel opinion reinstated, 626 F.2d 1200 (5th Cir. 1980), we explained that section two of the Twenty-first Amendment:

> is unique in the constitutional scheme in that it represents the only express grant of power to the states, thereby creating a fundamental restructuring of the constitutional scheme as it relates to one product--intoxicating liquors. See California v. LaRue, 409 U.S. 109, 115, 93 S.Ct. 390 [395], 34 L.Ed.2d 342 (1972).

There can be no doubt that this was the desire of those who framed the Twenty-first Amendment. As originally proposed, the Amendment contained three substantive sections, the third of which provided:

> Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold.

76 Cong. Rec. 4138 (1933). Section Three was deleted because of Congressional concern that its grant of concurrent power to regulate liquor to Congress would be construed to support the supremacy of federal regulation of liquor sales. As Senator Wagner pointed out, "We have expelled the system of national control

through the front door...and readmitted it forthwith through the back door of Section 3." 76 Cong. Rec. 4145 (1933). This would have been the "ironical result of an amendment designed to restore to the states control of their liquor problem." Id. With these concerns in mind, Section Three was deleted in the final version of the amendment.

Thus, any analysis of the validity of a state statute regulating liquor does not proceed via the traditional route for testing the constitutionality of state statutes. We must proceed from a vantage point of presumed state power and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, great deference must be accorded a comprehensive state regulatory scheme.

Clearly, state liquor laws are not immune from constitutional scrutiny. The Supreme Court has struck down such laws found in violation of the Establishment Clause, Larkin v. Grendel's Den, Inc., ___U.S.___, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982), federal antitrust laws passed under the Commerce Clause, California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), the Equal Protection Clause of the Fourteenth Amendment, Craig v. Boren, supra, federal procedural due process requirements, Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971), and the Export-Import Clause, Department of Revenue v. James B. Bean Distilling Co., 377 U.S. 341, 84 S.Ct. 1247, 12 L.Ed.2d 362 (1964). Nevertheless, the Supreme Court has twice, in examining the

interface of the First and Twenty-first Amendments, given an unusual amount of deference to state liquor regulations.

In California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), the plaintiffs challenged a California regulation banning nudity, and live performances, films and pictures depicting certain actual and simulated sexual acts, in nightclubs and bars where alcoholic beverages were sold. The Supreme Court did "not disagree with the District Court's determination that these regulations on their face would proscribe some forms of visual presentation that would not be found obscene" under Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) and later cases. 409 U.S. at 116, 93 S.Ct. at 395. The Court held, however, that the normal analyses of obscenity under Roth and

communicative conduct under United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) did not apply because of the added consideration of the Twenty-first Amendment. It found that "the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals," 409 U.S at 114, 93 S.Ct. at 395, and that "the case for upholding state regulation in the area of the Twenty-first Amendment is undoubtedly strengthened by that enactment," id. at 115, 93 S.Ct. at 395 (emphasis added). The Court found that the state's conclusions as to the need for the regulations were not "irrational," or "unreasonable," and that "wide latitude as to the choice of means to accomplish a permissible end must be

accorded the state agency that is itself the repository of the State's power under the Twenty-first Amendment." Id. at 116, 93 S.Ct. at 395. The opinion of the Court concludes with the following passage:

> The Department's conclusion, embodied in these regulations, that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one. Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires, we cannot hold that the reg ulations on their face violate the Federal Constitution.

Id. at 118-19, 93 S.Ct. at 397.

In New York State Liquor Authority v. Bellanca, 452 U.S. 714, 101 S. Ct. 2599, 69 L.Ed.2d 357 (1981), the Court upheld a state ban on topless dancing in liquor establishments. Notably, Ballanca was decided after Central Hudson Gas and Craig v. Boren. Despite arguments that the acts in question did not partake of

gross sexuality as in LaRue and that there was "no legislative finding that topless dancing poses anywhere near the problem posed by acts of 'gross sexuality,'" 452 U.S. at 717, 101 S.Ct. at 2601, the Court upheld the regulation, concluding that:

> [T]he elected representatives of the State of New York have chosen to avoid the disturbances associated with mixing alcohol and nude dancing by means of a reasonable restriction upon establishments which sell liquor for on-premises consumption. Given the "added presumption in favor of the validity of the state regulation" conferred by the Twenty-first Amendment, California v. LaRue, 409 U.S., at 118, 93 S.Ct., at 397. we cannot agree with the New York Court of Appeals that the statute violates the United States Constitution. Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment. Although some may quarrel with the wisdom of such legislation and may consider topless dancing a harmless diversion, the Twenty-first Amendment makes that a policy judgment for the state legislature, not the courts.

Id. at 718, 101 S.Ct. at 2601.

The test applied in LaRue and Bellanca is less strict than that applied in Central Hudson Gas. First, the former test employs a rational basis scrutiny, requiring only a reasonable or rational means of reaching a permissible end, as opposed to a higher level of scrutiny imposed by the latter test. Second, LaRue and Bellanca employ a presumption in favor of validity, while ordinarily the burden is on the party defending a restriction on speech, even in a commercial speech case. See Bolger v. Youngs Drug Products Corp., ____ U.S. ____, ____ n. 20, 103 S.Ct. 2875, 2882 n. 20, 77 L.Ed. 2d 469 (1983). LaRue and Bellanca are cases where fully protected speech was constitutionally restricted because the restriction was incidental to the rational regulation of liquor. It may

follow that because any restriction on the advertisement of liquor itself is necessarily related, rationally and directly, to liquor regulation, restrictions placed upon that advertisement by the states are consistent with the First Amendment.

C. Queensgate and Capital Broadcasting

The State argues that two rulings by the Supreme Court have precedential effect here. The first is Queensgate Investment Co. v. Liquor Control Commission, 69 Ohio St.2d 361, 433 N.E.2d 138, appeal dismissed, ___ U.S. ___, 103 S.Ct. 31, 74 L.Ed.2d 45 (1982). That case involved a First Amendment challenge to an Ohio regulation that generally permitted liquor advertising, but required that liquor permit holders "not advertise the price per bottle or drink of any alcoholic beverage, or in any

manner refer to price or price advantage except within their premises and in a manner not visible from the outside of said premises." 433 N.E.2d at 139 n. 1. The regulation was upheld by the Ohio Supreme Court, and an appeal was taken to the United States Supreme Court, the jurisdictional statement questioning whether the regulation violated the First Amendment. Mississippi argues that the summary dismissal for want of a substantial federal question by the Supreme Court in Queensgate binds us in this case.

The Supreme Court has declared that while summary dispositions of appeals are decisions on the merits that bind lower federal courts, such decisions extend only to "the precise issues presented and necessarily decided by those actions." Mandel v. Bradley, 432 U.S. 173, 176, 97

S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977). Queensgate did not involve the precise issues presented here, since the Ohio regulation was more narrowly drawn than the Mississippi regulation. The Ohio statute only banned certain price advertisements and might be viewed as a "time, place and manner" restriction, unlike the Mississippi regulation.

Nevertheless, we agree with the Tenth Circuit, which when recently examining Oklahoma's liquor advertising ban, noted that "Queensgate manifestly presented an issue concerning the tension between the First and Twenty-first Amendments." Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490, 497 (10th Cir. 1983), cert. granted sub nom. Capital Cities Cable, Inc. v. Crisp, ___U.S.___, 103 S.Ct.___, 77 L.Ed.2d___, 52 U.S.L.W. 3230 (Oct. 4, 1983) (No. 82-1795). We also agree with

the state that the price advertising at issue in Queensgate lies near the center of the commercial speech doctrine and is probably as likely to deserve commercial speech protection as the "lifestyle" advertisements that the state alleges the plaintiffs in this case are interested in displaying. See Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) (upholding lawyer price advertising); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761, 96 S.Ct. 1817, 1825, 48 L.Ed.2d 346 (1976) (upholding drug prescription price advertising and noting that "[the] 'idea' he wishes to communicate is simply this: 'I will sell you the X prescription drug at the Y price.'"

We take a middle road on this issue, following the approach taken in Crisp, supra, and Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978), cert. denied, 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979). While the summary dismissal by the Supreme Court in Queesgate must "caution us" against finding the Mississippi regulations unconstitutional, Plante, 575 F.2d at 1125-26, we nevertheless are not relieved of our duty "to undertake an independent examination of the merits." Mandel v. Bradley, supra, 432 U.S. at 177, 97 S.Ct. at 2241.

The state and amicus parties also argue that the Supreme Court's summary affirmance in Capital Broadcasting Co. v. Mitchell, 333 F.Supp. 582 (D.D.C. 1971) (three-judge court), aff'd mem., 405 U.S. 1000, 92 S.Ct. 1289, 31 L.Ed.2d 472

(1972), operates as compelling authority in this case. The decision, upholding a federal ban on broadcasting of cigarette commercials, is of limited precedential value for two reasons. First, Capital Broadcasting antedated the emergence of the commercial speech doctrine in the mid-1970's, and was based on the view that commercial speech was completely outside the protection of the First Amendment. Second, the Supreme Court has itself expressly limited Capital Broadcasting to "the special problems of the electronic broadcast media," Virginia Board of Pharmacy, supra, 425 U.S. at 773, 96 S.Ct. at 1831, that make that form of communication "'especially subject to regulation in the public interest,'" Bigelow v. Virginia, 421 U.S. 809, 825 n. 10, 95 S.Ct. 2222, 2234 n.

10, 44 L.Ed.2d 600 (quoting Capital Broadcasting, 333 F.Supp. at 584).

III. The Central Hudson Gas Test

We base our decision, ultimately, upon the application of the Supreme Court's analysis in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980):

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566, 100 S.Ct. at 2351.

In Bolger v. Youngs Drug Products Corp., ___ U.S. ___, 103 S.Ct. 2875, 77

L.Ed.2d 469 (1983), the latest Supreme Court commercial speech case at this writing, the Court reaffirmed the Central Hudson Gas test as the basic method of deciding commercial speech cases.

A. Parts One and Two: Protected Speech and State Interest

We assume, following the discussion above, that liquor advertising in Mississippi should be treated at the outset as protected commercial speech. There can be no question, on the next step, that Mississippi does assert a substantial interest, which the state described to be "safeguarding the health, safety and general welfare of its citizens by controlling the artificial stimulation of liquor sales and consumption created by the advertising of liquor." Whatever the medicinal or social value for those who use alcohol moderately, alcohol abuse

takes an enormous toll from society and the lives of many people. Testimony in Lamar Outdoor Advertising concentrated on the role alcohol plays in coronary heart disease, gastrointestinal cancer, cirrhosis of the liver, traffic accidents, and occupational and family problems. The court in Dunagin took judicial notice of these problems. 489 F.Supp. at 771 n. 11.

B. Part Three: Direct Advancement of The State Interest

The dispute begins with the third part of the Central Hudson Gas test. Does Mississippi's restriction against advertising directly advance the asserted state interest? In Dunagin, the trial judge, relying on the expert affidavit presented or his own knowledge and common sense, concluded in a summary judgment

that "[t]he purpose of advertising alcoholic beverages is to promote consumption and thereby stimulate sales of alcoholic beverages. Increased sales of these beverages are highly correlated with increased problems associated with their use." 489 F.Supp. at 771 n. 11.

Other courts facing similar fact situations have reached the same conclusion--that advertising and consumption are directly linked. In Queensgate Investment Co. v. Liquor Control Commission, 69 Ohio St.2d 361, 433 N.E.2d 138, 142, appeal dismissed, U.S.____, 103 S.Ct. 31, 74 L.Ed.2d 45 (1982), the Ohio Supreme Court found that "[t]he advertising of drink prices and price advantages would encourage and stimulate excessive consumption of alcoholic beverages; and advertising prohibition aids the interest in

preventing that consumption." In Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490, 501 (10th Cit. 1983), cert. granted sub nom. Capital Cities Cable, Inc. v. Crisp, ___U.S.___, 103 S.Ct.___, 77 L.Ed.2d___, 52 U.S.L.W. 3230 (Oct. 4, 1983) (No. 82-1795), the Tenth Circuit found it not "constitutionally unreasonable for the State of Oklahoma to believe that advertising will not only increase sales of particular brands of alcoholic beverages but also alcoholic beverages generally." See also Williams v. Spencer, 622 F.2d 1200, 1205 (4th Cir. 1980) (agreeing with trial court's judicial notice that "an advertisement encouraging the use of drugs encourages actions which in fact endanger the health or safety of students"); Capital Broadcasting v. Mitchell, 333 F.Supp. 582, 586 (D.D.C. 1971) (three-judge

court), aff'd mem., 405 U.S. 1000, 92 S.Ct. 1289, 31 L.Ed.2d 472 (1972) (noting "close relationship between cigarette commercials broadcast on the electronic media and their potential influence on young people").

The trial judge in Lamar Outdoor Advertising heard testimony from experts on the issue. The advertisers' expert, a professor of sociology who has specialized in alcoholism, testified that advertising only affected brand loyalty and market share, rather than increasing overall consumption or consumption of individual consumers. The state's expert, a medical doctor and professor of psychiatry who has done research in alcoholism, testified that there was "a strong correlation between an increase in alcohol advertising and consumption." 539 F.Supp. at 821. The trial court found

that "[d]efendants failed to produce concrete scientific evidence to substantiate their position that alcohol advertising artificially stimulates consumption thereof," and concluded that Mississippi's regulation of advertising "does little to directly advance the government's interest in promoting

temperance." Id, at 829.[8] that they lose hundreds of thousands of dollars of

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8. The degree to which an appellate court should defer to the "fact" findings of a trial judge as to the latest truths in the social sciences is an interesting question. The argument can be made that as long as the trial court applied the right legl test or the appropriate level of scrutiny, his findings under each prong of the test, here the Central Hudson Gas test, and his decision should be upheld on appeal. The Lamar Outdoor Advertising court's finding that advertising restrictions do not directly advance the state's interests since there is no scientifically concrete link between advertising and alcohol consumption sounds very much like a finding of fact. Should this finding be subject only to a clearly erroneous standard of review? Clearly not.

In the first place, the issue of whether there is a correlation between advertising and consumption is a legislative and not an adjudicative fact question. It is not a question specifically related to this one case or controversy; it is a question of social factors and happenings which may submit to some partial empirical solution but is likely to remain subject to opinion and reasoning. See Fed. R. Evid. 201 advisory committee note. That reasoning is the responsibility of legislators and judges, assisted by scholars as well as social scientists. The specific issue

advertising income by virtue of the Mississippi restriction. See Metromedia,

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(CONT.)here was undoubtedly considered by the Mississippi Legislature when local option and the curtailment of liquor consumption were being studied. Now the issue has moved to the judicial stage. If the legislative decision is not binding at this stage, at least it carries great weight. Certainly it cannot be thrust aside by two experts and a judicial trier of fact.

The writings and studies of social science experts on legislative facts are often considered and cited by the Supreme Court with or without introduction into the record or even consideration by the trial court. E.g., Barefoot v. Estelle, ---U.S.---,--- n. 7, 103 S.Ct. 3383, 3397 n. 7, 77 L.Ed.2d 1090 (1983) (validity of predictions of violent behavior); New York v. Ferber, ---U.S.---,--- n. 9, 102 S.Ct. 3348, 3355 n. 9, 73 L.Ed.2d 1113 (1982) (the effect upon the child used as a subject for pornographic materials); Ballew v. Georgia, 435 U.S. 223, 231 n. 10, 233 n. 11, 98 S.Ct. 1029, 1034 n. 10, 1035 n. 11, 55 L.Ed.2d 234 (1978) (effect of the size of jury upon deliberation and verdict); Gregg v. Georgia, 428 U.S. 153, 184 n. 31, 96 S.Ct. 2909, 2930 n. 31, 49 L.Ed.2d 859 (1976) (the deterrent effect of capital punishment); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 n. 8, 93 S.Ct. 2628, 2635 n. 8, 37 L.Ed.2d 446 (1973) (the relation between obscenity and socially

Inc. v. City of San Diego 453 U.S. 490, 504 n. 11, 101 S.Ct. 2882, 2890 n. 11,

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(CONT.)deleterious behavior); Brown v. Board of Education of Topeka, 347 U.S. 483, 494 n. 11, 74 S.Ct. 686, 692 n. 11, 98 L.Ed. 873 (1954) (the effect of segregation upon minority children).

Furthermore, the decision on whether a regulation of commercial speech directly advances the state's interest, for example, is an exercise of constitutional adjudication wherein appellate courts play a special role. Applying the legal tests that have evolved in constitutional law invariably requires subtle legal distinctions, a sense of history, and an ordering of conflicting rights, values and interests. The Supreme Court has often warned that each First Amendment case must be analyzed separately, based on the particular method of communication involved, and the values and dangers implicated. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501, 101 S.Ct. 2882, 2889, 69 L.Ed.2d 800 (1981); FCC v. Pacifica Foundation, 438 U.S. 726, 748, 98 S.Ct. 3026, 3039, 57 L.Ed.2d 1073 (1978); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557, 95 S.Ct. 1239, 1245, 43 L.Ed.2d 448 (1975); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503, 72 S.Ct. 777, 781, 96 L.Ed. 1098 (1952); Kovacs v. Cooper, 336 U.S. 77, 97, 69 S.Ct. 448, 458, 93 L.Ed. 513 (1949). "The protection available for particular commercial expression turns on the nature both of

69 L.Ed.2d 800 (Justice White, for plurality), 544, 101 S.Ct. at 2911

(CONT.)the expression and of the government interests served by its regulation." Central Hudson Gas, supra, 447 U.S. at 563, 100 S.Ct. at 2350. The questions raised in such cases involve mixed questions of law and fact. In this case, for instance, the extent to which Metromedia, Bellanca, LaRue and other cases temper the Central Hudson Gas test is a legal question.

There are limits to which important constitutional questions should hinge on the views of social scientists who testify as experts at trial. Suppose one trial judge sitting in one state believes a sociologist who has found no link between alcohol abuse and advertising, while another trial judge sitting in another state believes a psychiatrist who has reached the opposite conclusion. A similar situation actually occurred here. Should identical conduct be constitutionally protected in one jurisdiction and illegal in another? Should the fundamental principles of equal protection delivered in Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), be questioned if the sociological studies regarding racial segregation set out in the opinion's footnote 11 are shown to be methodologically flawed? Should the constitutionality of the property tax as a means of financing public education, resolved in

(Justice Stevens, dissenting in part)

(1981). It is beyond our ability to

(CONT.)San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), depend on the prevailing views of educators and sociologists as to the existence of a cost-quality relationship in education? Does capital punishment become cruel and unusual when the latest regression models demonstrate a lack of deterrence? The social sciences play an important role in many fields, including the law, but other unscientific values, interests and beliefs are transcendent.

Perhaps for these reasons, the Supreme Court's recent commercial speech and other relevant speech cases indicate that appellate courts have considerable leeway in deciding whether restrictions on speech are justified. In none of them did the Court rely heavily on fact findings of the trial court. In Bolger v. Youngs Drug Products Corp., ---U.S.---, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983), the Court struck down 39 U.S.C. § 3001(e)(2), a law prohibiting the mailing of unsolicited contraceptive advertisements. It agreed that the government had a substantial interest in aiding parents' efforts to control the manner in which their children became informed about birth control. The Court held, however, that the statute provided only the most limited incremental support for the interest

understand why huge sums of money would be devoted to the promotion of sales of

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(CONT.)asserted, in part by "reasonably assum[ing] that parents already exercise substantial control over the disposition of mail once it enters their mailboxes." 103 S.Ct. at 2884. In Metromedia, despite assertions that "the record is inadequate to show any connection between billboards and traffic safety" the judgment of the Court agreed with the "common-sense" belief of local lawmakers and other courts that billboards do pose substantial traffic safety hazards. 453 U.S. at 508-09, 101 S.Ct. at 2892-93. In Bellanca, the Court again deferred to the "common sense" conclusion of the state legislature that "any form of nudity coupled with alcohol in a public place begets undesirable behavior." 452 U.S. at 718, 101 S.Ct. at 2601. Similarly in Central Hudson Gas, the Court in another apparent exercise of judicial notice found "an immediate connection between advertising and demand for electricity" and therefore a direct link between the ban on advertising and the state interest in conservation. 447 U.S. at 569, 100 S.Ct. at 2353. See also Guzick v. Drebus, 431 F.2d 594, 599 (6th Cir. 1970), cert. denied, 401 U.S. 948, 91 S.Ct. 941, 28 L.Ed.2d 231 (1971) (holding in First Amendment case that, "when dealing with questions of constitutional magnitude, we are not at liberty to accept the fact trier's findings merely because we consider

liquor without expected results, or continue without realized results. No doubt competitors want to retain and expand their share of the market, but what businessperson stops short with competitive comparisons? It is total sales, profits, that pay the advertiser; and dollars go into advertising only if they produce sales. Money talks: it talks to the young and the old about what counts in the marketplace of our society, and it talks here in support of Mississippi's concerns.

The approach taken by the Supreme Court in Central Hudson Gas is worthy of study here. There the Court found:

(CONT.)them not 'clearly erroneous'" under Fed.R.Civ.P. 52(a)).

> There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order.

447 U.S. at 569, 100 S.Ct. at 2353. The plaintiffs here try to distinguish Central Hudson Gas by arguing that the electric utility in that case was a monopoly, and therefore was not competing for a share of the market as are the advertisers here. In fact, however, the Court expressly found that the utility was in direct competition with other suppliers in certain markets:

> Monopoly over the supply of a product provides no protection from competition with substitutes for that product. Electric utilities compete with suppliers of fuel oil and natural gas in several markets, such as those for home heating and industrial power. This Court noted the existence of inter-fuel competition 45 years

> ago, see West Ohio Gas Co. v. Public Utilities Comm'n, 294 U.S. 63, 72, 55 S.Ct. 316, 321, 79 L.Ed. 761 (1935). Each energy source continues to offer peculiar advantages and disadvantages that may influence consumer choice.

Id. at 567.

Metromedia is also instructive. While noting the meager record on the question of whether the billboard ban directly advanced governmental interests, the judgment of the Court continued:

> Noting that "[b]illboards are intended to, and undoubtedly do, divert a driver's attention from the roadway," ibid., and that whether the "distracting effect contributes to traffic accidents invokes an issue of continuing controversy," ibid., the California Supreme Court agreed with many other courts that a legislative judgment that billboards are traffic hazards is not manifestly unreasonable and should not be set aside. We likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing cou rts that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that these judgments are

unreasonable. As we said in a different context, Railway Express Agency, Inc. v. New York, supra, [336 U.S. 106] at 109, 69 S.Ct. [463] at 465 [93 L.Ed. 533]:

> "We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York city. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false."

453 U.S. at 508-09, 101 S.Ct. at 2892-93. As in Metromedia, the subject of regulation here--liquor--must be viewed as a matter of peculiar importance to state and local authorities by virtue of the Twenty-first Amendment.

[1] We conclude that the advertising ban is sufficiently justified to pass constitutional muster. We simply do not believe that the liquor industry spends a billion dollars a year on advertising solely to acquire an added market share

at the expense of competitors. Whether we characterize our disposition as following the judicial notice approach taken in Central Hudson Gas, or following the "accumulated, common-sense judgment" approach taken in Metromedia, we hold that sufficient reason exists to believe that advertising and consumption are linked to justify the ban, whether or not "concrete scientific evidence" exists to that effect. Moreover, we believe that the added presumption in favor of validity required by LaRue, Bellanca and Queensgate helps to establish the balance in favor of the state, if balancing be necessary.

The advertisers argued, to the satisfaction of the trial judge in Lamar Outdoor Advertising, that even if there is a connection between advertising and consumption, the intrastate advertising

ban does no good because Mississippi residents are "inundated" and "saturated" with liquor advertising in broadcasts, magazines and newspapers entering from outside the state. 539 F.Supp. at 829-30.

We do not find this argument compelling for several reasons. First, the plaintiffs would not be pursuing this case so vigorously if the market were truly saturated. They believe that they will find customers interested in further promoting liquor products. Second, their evidence that liquor advertisements appeared in national magazines in the Jackson library, out-of-state radio and television broadcasts and out-of-state newspapers does not establish that advertising would not dramatically increase if the intrastate ban is invalidated. Again, the willingness of the fifty-six plaintiffs in Lamar Outdoor

Advertising to litigate this matter suggests otherwise. Third, this argument cuts both ways. The commercial speech doctrine was created primarily out of concern in protecting consumers and the information they receive. If it were true that consumers are now being inundated with commercial information about liquor in contravention of the state's interests, the values behind the commercial speech doctrine would not be very much threatened.

C. Part Four: Extensiveness of The Regulation

Finally, we hold that the advertising restrictions are not more extensive than necessary to serve the state interest, as required by the fourth element of Central Hudson Gas. Again, we must apply this requirement in light of LaRue, Bellanca and Queensgate. See, LaRue, 409

U.S. at 116, 93 S.Ct. at 395 ("wide latitude as to choice of means...must be accorded the state agency").

[2] The state restrictions on liquor advertising are no broader than necessary to pursue its goal of preventing the artificial stimulation and promotion of liquor sales and consumption. No other types of advertising are restricted.

Again, we find the plurality's opinion in Metromedia helpful:

> [W]e reject appellants' claim that the ordinance is broader than necessary and, therefore, fails the fourth part of the Central Hudson test. If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them. The city has gone no farther than necessary in seeking to meet its ends. Indeed, it has stopped short of fully accomplishing its ends: It has not prohibited all billboards, but allows on-site advertising and some other specifically exempted signs.

453 U.S. at 508, 101 S.Ct. at 2892. By analogy, the state here believes that the advertising itself represents a hazard to the health, safety and welfare of its citizens. The restrictions permit certain types of informational advertising of use to the consumer such as price advertising inside licensed premises, but bar those displays that it believes will encourage excess consumption.

We do not believe that a less restrictive time, place and manner restriction, such as a disclaimer warning of the dangers of alcohol, would be effective. The state's concern is not that the public is unaware of the dangers of alcohol. See Restatement (Second) of Torts § 402A comment j (1965) (sellers of alcoholic beverages not required to warn of dangers, which are generally known

and recognized). The concern instead is that advertising will unduly promote alcohol consumption despite known dangers.[9]

The advertisers offer, as an example of constitutional manner and timing of advertising regulation, the prohibition of a billboard, located by a drive-through bar at the edge of a wet county line, announcing that the bar offers "the last chance to buy mixed drinks for the next 30 miles." That prohibition would be proper, they say, because the billboard intentionally promotes dangerous consumption and unlawful transportation while driving 30 miles through the dry county. The mistake of that argument is that it regards the state interest as

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9. Cf. Capital Broadcasting, supra, 333 F.Supp. at 585 ("Congress had convincing evidence that the Labeling Act of 1965 had not materially reduced the incidence of smoking").

being opposed only to the unlawful use of liquor. But Mississippi's policy is much broader, as stated in the 1966 statute: it is against the sale and possession of intoxicating liquor. All billboards advertising liquor are adverse to that policy and interest for the same reason that the billboard of the last-chance bar would be adverse to a policy against transportation of liquor through a dry county.

IV. Equal Protection

The plaintiffs maintain in the alternative that the Mississippi advertising ban violates the Equal Protection Clause of the Fourteenth Amendment, in that it discriminates against the local media by banning intrastate advertising while allowing advertising to enter Mississippi from out-of-state media. The district court

in Lamar Outdoor Advertising agreed, finding no rational link between the classification and the goal of controlling the artificial stimulation of the sale and consumption of artificial beverages. 539 F.Supp. at 830-31.

The plaintiffs ask us to apply the strict scrutiny standard of review, relying on the fundamental rights strand of strict scrutiny equal protection doctrine. The Supreme Court has limited the fundamental rights subject to strict scrutiny to those rights which are explicitly or implicitly guaranteed by the Constitution. San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 34, 93 S.Ct. 1278, 1297, 36 L.Ed.2d 16 (1973). Freedom of speech is of course a fundamental right that would ordinarily trigger strict scrutiny. Police Department of Chicago v. Mosely,

408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). The plaintiffs reason that, since the First Amendment has been extended to commercial speech which concerns lawful activity and is not misleading, strict scrutiny is appropriate.

[3] Strict scrutiny is clearly inappropriate. In this case we have held the Mississippi law entirely legal under the First Amendment, and parties cannot insist on strict scrutiny merely by asserting a First Amendment right that the court ultimately finds not to be violated. Furthermore, in all cases commercial speech is entitled to only a limited measure of protection under a diffferent standard of review. Under the Central Hudson Gas test, the state must demonstrate a substantial interest which is directly advanced by the regulation.

If the right to advertise for profits were fundamental, then parties to any particular commercial speech regulation could rely on a stricter standard of review--requiring a compelling state interest and necessary means chosen to attain it--by locating an unregulated class of advertisers and insisting on an equal protection analysis by the court.

It is important to recognize that, for identification with the commercial speech doctrine and the interests it protects, there is no classification here on which an equal protection analysis can be based. Commercial speech has been termed "unique because the speech does not advance any value implicating the interests of the speaker in the speech." Note, Constitutional Protection of Commercial Speech, 82 Colum. L. Rev. 720, 750 (1982). The primary interests

protected are those of the listener--the consumer--in receiving information. In Virginia Board of Pharmacy, the Court made clear that the First Amendment protects the right to receive information, 425 U.S. at 756-57, 96 S.Ct. at 1822-23, and noted that "[a]s to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate," id. at 763, 96 S.Ct. at 1826. We do not mean to suggest that media advertisers lack standing to challenge commercial speech regulations. See Metromedia, 453 U.S. at 504 n. 11, 101 S.Ct. at 2890 n. 11 (Justice White, for plurality), 544, 101 S.Ct. at 2911 (Justice Stevens, dissenting in part). Nevertheless, "[t]he First Amendment's concern for

commercial speech is based on the informational function of advertising...[and] there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." Central Hudson Gas, 447 U.S. at 563, 100 S.Ct. at 2350.

Hence, unlike other areas of First Amendment protection, the commercial speech doctrine is concerned primarily with the level and quality of information reaching the listener. From this vantage point, there is no classification upon which the plaintiffs can assert a meaningful equal protection claim. From the standpoint of the consumer, all residents in Mississippi have access to liquor advertising from interstate and intrastate sources, and indeed receive a great deal of out-of-state advertising

according to the plaintiffs. There is no discrimination against particular classes of consumers in the state.

[4] While the economic interests of the intrastate advertisers are at a disadvantage compared with those of the interstate media, this fact raises no First Amendment concerns for the reasons explained above, and gives rise to an equal protection issue requiring only minimal scrutiny. Under such deferential scrutiny of economic regulation, the classification challenged need only be rationally related to a legitimate state interest, New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 2516, 49 L.Ed.2d 511 (1976), and is invalid only if "wholly irrelevant to the achievement of the State's objective," McGowan v. Maryland, 366 U.S. 420, 425, 81 S.Ct. 1101, 1104, 6 L.Ed.2d 393 (1961).

Most assuredly there is nothing suspect about a state discriminating against its own citizens, in this case advertisers originating messages within the state. The state argues that it lacks jurisdiction to control transmissions and mailings entering its boundaries from other states, and cannot, for practical and legal reasons, block such disseminations. The state has reasonably chosen to restrict its regulation to those over which it has control. The Equal Protection Clause does not require "a legislature to enact a statute so broad that it may well be incapable of enforcement." Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 474, 101, S.Ct. 1200, 1207, 67 L.Ed.2d 437 (1981). We think it exceedingly unlikely that the state could block, jam, or otherwise ban all magazines,

newspapers, cable signals and radio and television broadcasts originating from other states that contain liquor advertisements, as a practical matter, and in the face of the Commerce Clause, the Supremacy Clause and the First Amendment. In upholding a Utah regulation that banned cigarette billboards while allowing cigarette advertisements in interstate publications, Justice Brandeis stated that "[i]t is a reasonable ground of classification that a state has power to legislate with respect to persons in certain situations and not with respect to those in a different one." Packer Corporation v. Utah, 285 U.S. 105, 110, 52 S.Ct. 273, 274, 76 L.Ed. 643 (1932). Furthermore, with economic regulation, "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the

legislative mind." Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563 (1955). The state could have concluded rationally that local advertising was the promotion of intoxicating liquor that was susceptible to regulation.

V.

We conclude that the Mississippi regulatory scheme is constitutionally valid. The judgment in Dunagin is AFFIRMED. The judgment in Lamar Outdoor Advertising is REVERSED.

JERRE S. WILLIAMS, Circuit Judge, with whom TATE, Circuit Judge, joins, specially concurring:

I.

I agree wholeheartedly with the result reached by the majority. I also am in full agreement with the Court's

reliance upon the test developed in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980). The application of this test properly leads us to the result reached by the majority.

It is with regret that I cannot join in the majority opinion, however, because of implications it sees in the Twenty-first Amendment. The majority opinion in Part II B discusses the Twenty-first Amendment as having implications justifying unusual and wholly unique intrusions upon the personal liberties of American citizens in the regulation of intoxicating liquor. I concede that there has been some indication of this possible effect of the Twenty-first Amendment in California v. LaRue, 409 U.S. 109, 114, 93 S.Ct. 390, 395, 34

L.Ed.2d 342 (1972), and in New York State Liquor Authority v. Bellanca, 452 U.S. 714, 717, 101 S.Ct. 2599, 2601, 69 L.Ed.2d 357 (1981). I view the doctrine as mischievous and insidious.

The purpose of the Twenty-first Amendment ws to remove all constitutional inhibitions as to the state's power to control intoxicating liquors as against the powers of the federal government, particularly but not exclusively in the domain of interstate and foreign commerce. It had nothing whatsoever to do with encroachment upon the individual liberties protected in the Constitution. The governments, state and federal, had exactly the same powers to control spirits after the passage of the Twenty-first Amendment as they had before, as against claims of individual liberty under free-

speech, due process, and equal protection.

A conclusion that the Twenty-first Amendment justifies greater intrusions upon the constitutional liberties of individual citizens than would otherwise be the case is an insidious doctrine because it holds that the Constitution places liquor in a totally unique position different from even dangerous drugs and other vice-prone products or occupations.

The power to control the production, sale, advertising, and consumption of intoxicating beverages in ways different from controlling the same social processes as they relate to food products, automobiles, television sets, and the like is based wholly upon the recognition that spirits create special problems which entitle the state to react with special legislative solutions. This

recognition has been with us from the beginning of our society right up to the present. It falls in the area of "police power," if you will. It does not depend to any degree upon the Twenty-first Amendment.

In recognizing the special problems related to liquor regulation, I have no difficulty whatsoever in agreeing with the cogent analysis of the majority opinion that the control of liquor advertising by the State of Mississippi does not run afoul of the constitutional protections of individual liberty. To hold otherwise exalts commercialism above the genuine concerns the State of Mississippi has a right to feel for its citizens, and the problems that liquor creates in our society.

II.

In one other matter I wish to reinforce the analysis in the majority opinion. The Court describes the "battle of the experts" on the question of whether advertising simply induces people to change brands of liquor or actually stimulates consumption. What this battle of the experts was actually asking us to do was to engage in the now outmoded substantive economic due process analysis. The fact that there was a battle of the experts on this issue proved that the issue was one of legislative policy. If the legislature of the State of Mississippi believes that liquor advertising increases liquor consumption, that is a legislative judgment that it has a right to make. And the fact that there may be some experts who think otherwise justifies testimony before the legislative committee

considering the legislation but does not justify a demand that this Court resolve that policy decision. To treat this issue as subject to our power to decide would lapse into the now thoroughly discredited earlier Supreme Court due process analysis which is exemplified by the statement by the Court in the notorious Lochner v. State of New York case, 198 U.S. 45, 57, 25 S.Ct. 539, 543, 49 L.Ed. 937 (1905): "Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week.... There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker,"

It is not for the courts to tell the states that they no longer have power to place reasonable limitations upon the commercial aspects of businesses which the state properly feels create a high level of social concern. The states can ban the sale of liquor entirely, just as they can of dangerous drugs. They can limit the sale to state-owned package stores. They can ration. They can prohibit all consumption of intoxicating beverages in public. They can engage in many types of regulations of varying stringency. To hold that one of those regulations cannot be a restriction on commercial exploitation by way of advertising would be a curious and unjustifiable anomoly.

GEE, Circuit Judge, with whom GOLDBERG, POLITZ, RANDALL and

HIGGINBOTHAM, Circuit Judges, join, dissenting:

Judge Reavley's opinion for a majority of the court--workmanlike and thorough as always--takes a view of the Mississippi arrangement regulating liquor advertising with which it is hard to disagree violently. Even so, I believe that the better one is expressed in our panel opinions, reported at 701 F.2d 314 and 335. Since it is there set out in great detail, I see no occasion to write further.

For the reasons there expressed, then, I respectfully dissented.

HIGGINBOTHAM, Circuit Judge, concurring in the dissenting opinion:

I join Judge Gee's dissent. I remain convinced that the panel decision was a correct application of the doctrine of

commercial speech as developed by the Supreme Court. I take advantage of the freedom of dissent to add this brief separate statement to express a view I do not see clearly stated elsewhere.

The immediate turn of this case in the long view of constitutional principle has little significance. The case may be little more than how judges view whiskey, or how judges apply their own notions of what is a good and what is a bad law. This intended exaggeration is a sufficiently accurate description of this type of judicial review that we are hesitant to cheerfully admit engaging in it. The point is that the balancing of interests exercise of Virginia Board of Pharmacy and its younger companions reduces the exaggeration to an uncomfortable level.

The efficiency with which a market allocates resources unquestionably depends on a free flow of market information. I had supposed that it was the province of the Congress and particularly a state legislature to decide whether government ought to weigh into that free exchange; that is, I would not have thought it the role of the courts to quarrel with a state legislature's regulatory pushes and shoves of its own economy.

Nevertheless, the cases instruct that we are to so review and I am reluctant to express my own doubts, which go to the very notion of commercial speech, by applying those cases in a less than faithful way. Doing so substitutes one brand of activism for another.

I agree with much of the majority opinion and much of Judge Williams'

concurring opinion but I suggest that hesitancy about the type of inquiry provoked by the commercial speech doctrine has affected the weighing of the state's asserted interests. If the First Amendment is a source of protection for the flow of market information to consumers it is a remarkable draw upon First Amendment jurisprudence that turns that idea into a state's right to keep information pertinent to a lawful transaction from consumers for fear that consumers might misapply it. Of course we are Lochnerizing and intruding into the affairs of a state. I suggest that distaste for the intrusion has created a reluctance in actual application to give full sway to the commercial speech doctrine as developed by the Supreme Court, and was an unidentified hand on the weighing scale of the majority; that

it was this added weight which separated the majority and dissenting opinions.

It is hard for me to see that Mississippi has "won" this case. It can ban the advertising of whiskey, true enough, but only because federal judges answerable to no voters have decided that they "agree" with the Mississippi legislature. In the long haul this is no win at all. That seems to me to be a predictable, if not inevitable, consequence of the doctrine itself. This exaggerates, but it is sufficiently accurate that we ought to be troubled. I am.

CERTIFICATE OF SERVICE AND FILING

STATE OF MISSISSIPPI
COUNTY OF LAFAYETTE

I, Grady F. Tollison do hereby certify that I have this day deposited in the United States mail, 40 copies of the foregoing Petition for Writ of Certiorari to the Clerk of the United States Supreme Court, 1 First Street, N.E., Washington, D.C., 20543, as well as three copies to the Attorney General, Mr. Edwin Pittman, State of Mississippi, State Capitol, Jackson, Mississippi 39205 and City Attorney, Mr. Edwin Perry, 1120½ Van Buren Avenue, Oxford, Mississippi 38655.

This the 23rd day of January, 1984.

Grady F. Tollison

GRADY F. TOLLISON

SWORN TO AND SUBSCRIBED before me this the 23rd day of January, 1984.

Nina S. Tollison

NOTARY PUBLIC

My Commission expires: My Commission Expires Jan. 17, 1987

83-1221

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

NO._____

in the United States Supreme Court

1984 Term

KATHY DUNAGIN, ET AL., *Petitioner,*

versus

CITY OF OXFORD, MISSISSIPPI, ET AL. *Respondent*

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX

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Attorney for Petitioners
Kathy Dunagin, et al.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI WESTERN DIVISION

KATHY DUNAGIN and
GLENN ALLISON, et al., Plaintiffs

V. No. WC79-83-WK-P

THE CITY OF OXFORD,
MISSISSIPPI, et al., Defendants

MEMORANDUM OF DECISION

This class-action lawsuit challenges the constitutionality of Mississippi laws that ban the advertising of certain alcoholic beverages. At issue is whether the free speech clause of the First Amendment prevents the state from forbidding liquor advertisements and whether the Twenty-first Amendment empowers the state to ban liquor advertisements regardless of any First Amendment protections. Suit was brought

by the editor and business manager of The Daily Mississippian, a newspaper published by students of the University of Mississippi at Oxford. Representing past, present and future editors and business managers,[1] plaintiffs named as defendants the City of Oxford, its Mayor and the City Aldermen (collectively referred to as City). Because plaintiffs drew into question the constitutionality of a Mississippi statute, we granted the State of Mississippi permission to intervene as a defendant. See 28 U.S.C. § 2403(b).

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1. By order of February 26, 1980, the court certified this cause as a class action, the class consisting of:

> All past, present and future students elected or appointed to an editorial or business manager's position with The Daily Mississippian, a newspaper published by students at the University of Mississippi.

Plaintiffs invoke the court's jurisdiction under 28 U.S.C. §§ 1331 and 1343(3) for cause of action under 42 U.S.C. § 1983. They seek declaratory and injunctive relief and attorney's fees. Pending before the court are the State's motion to stay or dismiss this suit pending the outcome of a similar case in the United States District Court for the Southern District of Mississippi, Lamar Outdoor Advertising v. Mississippi State Tax Commission, No. J78-0472 (R); cross motions for summary judgment on the merits of the dispute; and plaintiffs' motion to dismiss the City's abuse-of-process counterclaim for failure to state a claim upon which relief can be granted.

I.

The facts of this cause are undisputed.[2] Early in 1979, The Daily Mississippian ran advertisements for beer in some of its issues. Subsequently, an Oxford city policeman visited the offices of The Daily Mississippian to advise the editor that the paper should cease advertising beer because state law prohibits it. This visit was followed, on March 29, by a letter from Hon. G. A. Gafford, Oxford City Attorney. Gafford wrote the editor that the City had received a number of complaints concerning beer advertising in the local papers. He recounted that the Chief of Police had discussed the matter with The Daily Mississippian's editor and with the

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2. As mandated by Rule 56, F. R. Civ. P., we find that the record discloses "no genuine issue as to any material fact."

editor of the Oxford Eagle, a local paper neither affiliated with the University nor party to this suit. He stated that the Oxford Eagle had agreed to discontinue advertising of beer or other intoxicating beverages but that The Daily Mississippian continued to advertise beer in violation of Miss. Code Ann. § 97-31-1 (1972), which makes unlawful the publishing of a newspaper that contains advertisements for certain alcoholic

beverages.[3] Gafford continued:

> By your insistance in

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3. Section 97-31-1, with the portions attacked in this lawsuit underlined, reads as follows:

> It shall be unlawful for any person, firm, corporation or association, or any servant, official or employee thereof, (1) to advertise upon any street car, railroad car, or other vehicle of transportation, or at any public place or resort, or upon any sign or billboard, or by circulars, poster, price lists, newspapers, periodicals, or otherwise, within this state, alcoholic, intoxicating or spirituous liquors, or intoxicating bitters or other drinks which if drunk to excess, will produce intoxication, including among others, brandy, whisky, rum, gin, ale and porter, or to advertise the manufacture, sale, keeping for sale or furnishing of any of them, or the person from whom, or the firm or corporation from which, or the place where, or the method by which same, or any of them, may be obtained; (2) to circulate, publish, sell, offer for sale, or expose for sale, any newspaper, periodical, or other written printed matter in which any advertisement specified in this section shall appear, or to permit any sign or billboard containing such advertisement to remain upon one's premises; or (3) to circulate any price list, order blanks, or other matter, for the purpose of inducing or securing orders

> circulating these advertisements you indicate a complete unwillingness to cooperate with the responsible officials of the City of Oxford. By continuing this practice you will force the City of Oxford to seek injunctive relief as required by law. In addition, your advertising policies jeopardize the license of those you represent, jeopardizes [sic] the freedom of some of

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(CONT.)for said liquors, bitters, and drinks, or any of them hereinbefore mentioned, no matter where located. Any sheriff, constable, or other police officer, is authorized to remove any such advertisement from any sign, billboard or other public place, when it comes to his notice, and shall do so upon demand of any citizen. Any advertisement or notice containing the picture of a distillery, bottle, keg, barrel or box, or other receptacle represented as containing any liquors, bitters or drinks mentioned or designed to serve as an advertisement therof, shall be within the inhibition of this section.

Enforcement of § 97-31-1 is effected through § 97-31-3, which provides for injunctive relief and criminal penalties upon violation. The City enforces § 97-31-1 through § 19-1 of the City Code. This section makes all misdemeanors under state law offenses against the City as well.

> those for whom you advertise inasmuch as beer is illegal in Lafayette County outside of the city limits of Oxford with the campus falling in that classification, and you jeopardize access to beer and other liquors as a legal commodity to all of the citizens of Oxford and others residing therein which includes a lot of students.
>
> What you apparently preceive [sic] as a service to your readers really boils down to a disservice to the entire community.
>
> This is a request that you consider the adoption of a poicy which would eliminate the advertisement of intoxicating beverages in your paper.

Plaintiffs filed suit on June 7. Their initial complaint alleged that they had in the past advertised beer and wished to do so in the future. Conceding that the challenged statute does not prohibit the advertising of beer, as opposed to other alcoholic beverages, defendants moved to dismiss for lack of

case or controversy.[4] U.S. Const. art. III. Plaintiffs' counsel responded in their brief that a controversy continued to exist because plaintiffs wished to advertise alcoholic beverages other than beer. Since the complaint did not contain such an allegation, the court granted the motion to dismiss unless plaintiffs amended their complaint to allege either a past practice of advertising liquor or intoxicating beverages other than beer or an intent to do so in the future. Plaintiffs complied, alleging that they desire to advertise liquor other than

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4. Section 97-31-1 was enacted as 1916 Miss Laws ch. 104. At that time, it specifically included beer as one of the beverages prohibited to be advertised. By 1934 Miss Laws ch. 172, the legislature expressly deleted beer from the prohibition list. This is manifest from Chapter 172's title, which recites that it was "an Act to amend Section 2025 of Mississippi Code of 1930 [predecessor of § 97-31-1] so as to permit the advertising of wine and beer."

beer but are threatened by the City's position as reflected in Gafford's letter.

In the meantime the City had retreated somewhat from that position. On June 29 the City filed an ex parte "stipulation" that it would take no action against The Daily Mississippian to enforce § 97-31-1 pending the outcome of this case. Most recently, in its answer to plaintiffs' amended complaint, the City said that it will not attempt to secure compliance with the statute until its constitutionality is determined in Lamar Outdoor Advertising v. Mississippi State Tax Commission, a similar case pending in the United States District Court for the Southern District of Mississippi, and that it would abide by the result reached in that case. The City included in its answer a counterclaim

for abuse of process on the ground that plaintiffs harassed it by filing this suit because the City has no intention of interfering with plaintiffs' constitutional rights.

II.

At the outset, we inquire whether this lawsuit presents a case or controversy as required by Article III of the United States Constitution. If not, then we are without jurisdiction to proceed. See, e.g., Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 85 L. Ed. 826 (1941). The court acts with caution because the City has stated on the record that it has no intention of attempting to enforce § 97-31-1 until Lamar is resolved and that it will abide by the outcome of that case. It is possible that the City will never again threaten plaintiffs with the

statute, and the State of Mississippi has not taken any steps to enjoin or prosecute plaintiffs.

Before the City represented to plaintiffs that it would not attempt, at least for the time being, to enforce § 97-31-1, a case or controversy did exist. However, the constitutional requirement must be met at all times during the course of suit, not just at the outset. Ellis v. Dyson, 431 U.S. 426, 44 L. Ed. 2d 274 (1975); and, "as a general rule, 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.'" County of Los Angeles v. Davis, 440 U.S. 625, 631, 59 L. Ed. 2d 642 (1979), quoting United States v. W.T. Grant Co., 345 U.S. 629, 623, 97 L. Ed. 1303 (1953). Thus the City's assurances of non-prosecution

do not render plaintiffs' claim nonjusticiable. Rather, the court must consider whether it can be said with assurance that no reasonable expectation exists that the threatening conduct will recur and whether "interim relief or events have completely and irrevocably eradicated" its effects. Davis, 440 U.S. at 631. See Vitek v. Jones, 48 U.S.L.W. 4317, 4319 (Sup. Ct. 1980). "When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law." Davis, 440 U.S. at 631.

We do not find these conditions satisfied in the case sub judice. It is true that the City might never prosecute plaintiffs because the federal court in the Southern District of Mississippi

might declare the challenged statute unconstitutional in Lamar. However, the court could also rule the other way or dispose of the case without reaching the merits. Furthermore, there is no way to determine when the Southern District court may decide the case. During the interim the City might change its policy and elect to prosecute after all.

As to the second condition, the effects of the City's previous threats linger. Plaintiffs are in limbo over whether to advertise because, despite the City's present assurance that it will not proceed against them, at any time in the future the City may decide to prosecute. Plaintiffs derive income from running advertisements; the uncertainty surrounding the legality of doing so must surely be reflected in their success at soliciting advertisements from potential

customers hesitant to participate in breaking the law. Moreover, although the City has not threatened plaintiffs with criminal prosecution, the possibility that it may remains. We therefore conclude that this action does involve a case or controversy and that we consequently have jurisdiction to proceed.

III.

The State has moved the court to dismiss this claim without prejudice because a similar lawsuit, Lamar Outdoor Advertising v. Mississippi State Tax Commission, No. J78-0472(R), which was filed before this action, is pending in the United States District Court for the Southern District of Mississippi. As grounds therefor, the State relies upon "the doctrine of federal comity, a discretionary doctrine which permits one

district to decline judgment on an issue which is properly before another district." Church of Scientology v. United States Department of the Army, 611 F. 2d 738, 749 (9 Cir. 1979). This doctrine rests on considerations of judicial economy and the desire to avoid inconsistent decisions; "the general principle is to avoid duplicative litigation." Colorado River Water Conservation District v. United States, 424 U.S. 800, 817, 47 L. Ed. 2d 483 (1976).

"In its classic formulation, the comity doctrine permits a district court to decline jurisdiction over a matter if a complaint has already been filed in another district." Scientology, 611 F. 2d at 749. The first-to-file rule should not be disregarded lightly, but exceptions to it are warranted when the policies underlying it would be better

served. Id. at 750. The maxim is not law but is merely a generalized rule-of-thumb for applying the comity doctrine. It is to be considered in light of other factors and resolved in the court's discretion. 36A C.J.S. Federal Courts § 355(8) & nn. 52-53.20 (1961).

The State in essence makes two points in its motion to dismiss. First, it argues that the first-to-file rule-of-thumb is controlling. But as seen above, this rule is no more than a description of the circumstances in which the federal comity doctrine most frequently is invoked to achieve the goal of judicial efficiency. In Scientology the Ninth Circuit declined to apply the rule because proceedings in the second court had progressed past those in the first court. A similar situation exists here. The case sub judice is before us

on motions for summary judgment, but summary judgment in the Southern District case has been denied. Because the facts surrounding our case are simple and without dispute, summary judgment is appropriate and will help to avoid substantial litigation in Lamar.

Second, the State contends that Lamar involves a challenge to Mississippi's entire liquor advertising regulatory scheme. In comparison, the gist of plaintiffs' attack here involves the constitutionality only of Miss. Code Ann. § 97-31-1. Because Lamar is more comprehensive of the issues involved, says the State, this court should defer to the Southern District as the more appropriate and efficient arbitor of the dispute.

Rather than as a reason to dismiss, we regard the relative

complexity of Lamar as a basis to retain jurisdiction of the present suit. This case has crystallized; it is ripe for decision on the merits. Because in Lamar many parties wish to advertise alcoholic beverages through various communicative media it may well be some time before the court can act on it. An adjudication now will cause a timely disposition of the dispute between the parties before us. We accordingly exercise our discretion in favor of proceeding to the merits rather than dismiss this cause on account of Lamar.

IV.

Initially, we consider whether the First Amendment prohibits Mississippi from banning liquor advertisements in The Daily Mississippian on the basis of their content. The First Amendment, which binds the states through the Fourteenth

Amendment, provides: "Congress shall make no law...abridging the freedom of speech...." The freedom of speech stands in a preferred position vis-a-vis other constitutional rights, see, e.g., Murdock v. Pennsylvania, 319 U.S. 105, 87 L. Ed. 1292 (1943), because it 'has been recognized as one of the preeminent rights of Western democratic theory, the touchstone of individual liberty." J. Nowak, R. Rotunda, & J. Young, Handbook on Constitutional Law 712 (1978).

Even so, the freedom of speech is not absolute. The constitutional protection accorded free speech comes into play only when the communication in question is viewed as "speech." Some words or conduct are not considered "speech" because they do not propound ideas or contribute to "truth, science, morality, and arts in general." Roth v.

United States, 354 U.S. 476, 484, 1 L. Ed. 2d 1498 (1957) (obscenity). See also, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568, 86 L. Ed. 1031 (1942) ("fighting" words); United States v. O'Brien, 391 U.S. 367, 20 L. Ed. 2d 672 (1968) (burning draft card). Such activities are not entitled to constitutional protection.

Plaintiffs contend that the speech questioned here is "commercial" speech, or speech designed to culminate commercial transactions. The genesis of the commercial speech doctrine is found in Valentine v. Chrestensen, 316 U.S. 52, 54, 86 L. Ed. 1262 (1942), where the Court held that "the Constitution imposes no...restraint on government as respects purely commercial advertising." So, in years past, "commercial" speech, as opposed to speech that, for example,

"communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern," New York Times Co. v. Sullivan, 376 U.S. 254, 266, 11 L. Ed. 2d 686 (1964), was not accorded First Amendment protection. However, distinguishing between commercial and noncommercial speech proved difficult in pratice. With Pittsburgh Press Co. v. Pittsburgh Commission on Human Rights, 413 U.S. 376, 37 L. Ed. 2d 669 (1973), and Bigelow v. Virginia, 421 U.S. 809, 44 L. Ed. 2d 600 (1975), the Court virtually abolished the commercial speech doctrine, see Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 759, 48 L. Ed. 2d 346 (1976).

Nonetheless, differing standards of regulation for commercial and noncommercial speech remain. Noncommercial speech is subject to reasonable time, place and manner restriction. Such regulation must not rely on the content of the speech, must serve a significant governmental interest, and must leave open "ample alternative channels for communication of the information." Virginia State Board, 425 U.S. at 771 and cases cited therein.

In contrast, commercial speech is subject to "proper" time, place, and manner regulation. Id. This standard is less restrictive than that which government must meet to regulate noncommercial speech. It has "afforded commercial speech a limited measure of protection, commensurate with its

subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456, 56 L. Ed. 2d 444 (1978). See Friedman v. Rogers, 440 U.S. 1, 10 n. 9, 59 L. Ed. 2d 100 (1979). See also Virginia State Board, 425 U.S. at 771 n. 24. With commercial speech, the interests of the speaker and the audience must be balanced, but the scale tips more toward regulation in noncommercial than in commercial speech cases. However, the state may not go so far as to suppress completely "the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." Id. at 773.

Application of the commercial speech doctrine with respect to the truthfulness of commercial speech may be found in a number of suits in which advertisers and the Federal Trade Commission clashed over the content of advertisements. See, e.g., National Commission on Egg Nutrition v. FTC, 570 F. 2d 157 (7 Cir. 1977), cert. denied, 439 U.S. 821 (1978). More to the point here is Mississippi Gay Alliance v. Goudelock, 536 F. 2d 1073 (5 Cir. 1976), cert. denied, 430 U.S. 982 (1977), in which the Fifth Circuit upheld the right of a student newspaper's editor to refuse to run an advertisement that the court found tended to promote illegal homosexual activities. As Judge Goldberg noted in dissent, the majority's reasoning could be "read as an implicit holding that the...ad was 'unprotected'

speech for first amendment purposes" because of that tendency. Id. at 1878. Goudelock echoes the proposition that information about activity not "entirely lawful" is not constitutionally protected speech and therefore may be "completely suppress[ed]" by the state. See Virginia State Board, 425 U.S. at 773. See also Bates v. State Bar of Arizona, 433 U.S. 350, 384, 53 L. Ed. 2d 810 (1977) ("Advertising concerning transactions that are themselves illegal obviously may be suppressed."), citing Pittsburgh Press, 413 U.S. at 388.[5]

Because Mississippi completely suppresses the advertisement of alcoholic

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5. Cf. High Ol' Times, Inc. v. Busbee, 456 F. Supp. 1035 (N.D. Ga 1978) (advertisement assailing controlled substances laws not a direct solicitation of unlawful activity).

beverages,[6] resolution of this case depends upon whether liquor advertising promotes an "entirely lawful" activity.[7] If it does not, liquor advertisements are either not speech protected by the First Amendment or speech that the state may nonetheless ban because of its content.

Under Mississippi's Local Option Alcoholic Beverage Control Law, Miss. Code Ann. § 67-1-1 et seq., it is unlawful "to manufacture, distill, brew, sell, possess, import into this state, export from the state, transport,

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6. The State argues that it has not completely suppressed alcoholic beverage advertising because liquor retailers are free to advertise within their stores. We reject this argument on the authority of Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 52 L. Ed. 2d 155 (1977), which held prohibition of "For Sale" lawn signs tantamount to complete suppression.

7. We do not reach the question whether the content of any certain liquor advertising or advertisements may be truthful.

distribute, warehouse, store, solicit, take order for, bottle, rectify, blend, treat, mix or process any alcoholic beverage." Miss. Code Ann. § 67-1-9 (1972 & Supp. 1979).[8] However, a county or in some instances a judicial district thereof may remove itself from this state-wide prohibition by majority vote within the county. Id. §§ 67-1-11,-15. It is then legal to possess and transport alcoholic beverages within the county and to manufacture, sell, and distribute them in the county's incorporated municipalities, qualified resort areas, and clubs. Id. § 67-1-7. Nearly half of Mississippi's 82 counties have voted themselves out from under the prohibition. Lafayette County, within

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8. The Local Option Law defines "alcoholic beverage" to exclude wine and beer containing 4% alcohol by weight or less. Miss. Code Ann. § 67-1-5(a)(Supp. 1979).

which lies the University of Mississippi, is "wet." Of the seven counties bordering on Lafayette County, four are "dry."[9]

The Local Option Law does not expressly forbid the advertising of alcoholic beverages in "dry" areas, but it is beyond peradventure that such advertising must contribute to and encourage violation of the statute. This is true whether or not the newspaper is circulated only in a "dry" county because advertisement of liquor is apt to encourage consumers in "dry" counties to violate the law by purchasing liquor in "wet" counties for transportation home. This factor is exacerbated in the case of The Daily Mississippian because its principal readers are University students, particularly mobile citizens

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9. These are Tate, Union, Pontotoc, and Calhoun Counties. Marshall, Panola and Yalobusha Counties are "wet."

who come to Oxford from all sections of Mississippi to attend school. Some students doubtless purchase liquor in Oxford to take with them when they return home or visit with friends or relatives in "dry" counties.[10]

Because liquor advertising promotes activity illegal in a substantial portion of Mississippi, we hold that the state may regulate The Daily Mississippian's advertising of it even

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10. We also note that many of the students and other readers are under the age of 21. Even in "wet" counties a minor may not purchase or possess liquor. Miss. Code Ann. § 67-1-81 (Supp. 1979).

to the point of an absolute ban.[11] We reach this conclusion on two grounds.

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11. Even if complete suppression of liquor advertising were otherwise viewed as improper, balancing the interests at stake demonstrates that the state could nonetheless extensively regulate alcoholic beverage advertising. Mississippi has the duty of safeguarding the health, safety, and general welfare of its citizens. It is a medically known fact that alcohol is dangerous to consumers because it causes alcoholism and death due to heart disease, cancer, cirrhosis of the liver, and accidents of various kinds. Wider availability of alcohol leads to higher rates of alcoholism and mortality. The purpose of advertising alcoholic beverages is to promote consumption and thereby stimulate sales of alcoholic beverages. Increased sales of these beverages are highly correlated with increased problems associated with their use.

Recognizing these dangers, the Mississippi Legislature expressed its position in § 67-1-3 of the Local Option Law:

> The policy of this state is reannounced in favor of prohibition of the manufacture, sale, distribution, possession and transportation of intoxicating liquor, and the provisions against such manufacture, sale, distribution,

First, we hold that under Virginia State Board liquor advertisements are not

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(CONT.)possession and transportation of intoxicating liquor, as contained in Chapter 31 of Title 97, Mississippi Code of 1972 and elsewhere, are hereby redeclared the law of this state. The purpose and intent of this chapter is to vigorously enforce the prohibition laws throughout the state, except in those counties voting themselves out from under the prohibition law in accordance with the provisions of this chapter, and, in those counties, to require strict regulation and supervision of the manufacture, sale, distribution, possession and transportation of intoxicating liquor under a system of state licensing of manufacturers, wholesalers and retailers, which licenses shall be subject to revocation for violation of this chapter.

The courts of Mississippi have also noted alcohol's harmful effects. See Stepp v. State, 33 So. 2d 307 (Miss. 1948).

Compared to the State's interests, The Daily Mississippian's economic interest in advertising alcoholic beverages and 'the societal interest in the 'free flow of commercial information,'" First National Bank of Boston v. Bellotti, 435 U.S. 765, 783,

commercial speech within the protection of the First Amendment because they promote activity unlawful in Mississippi. Therefore, the State may regulate them as it pleases. Second, we hold that even if liquor advertisements are viewed as protected commercial speech in "wet" areas of Mississippi, they are subject to total suppression because they necessarily advocate illegal activity in "dry" areas of the State. Under Virginia

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(CONT.)55 L. Ed. 2d 707 (1978), quoting Virginia State Board, 425 U.S. at 764, are minimal. The beneficient effects of advertising seen in Virginia State Board, for example -- the dissemination of comparative drug prices to poor, sick, and aged consumers -- do not extend to alcoholic beverage advertising because greater availability at a lower price contributes to the harmful effects caused by greater consumption. Moreover, there is no constitutional right to buy or possess alcoholic beverages. Cf. Carey v. Population Services International, 431 U.S. 678, 52 L. Ed. 2d 675 (1977) (contraceptive devices constitutionally protected).

State Board, the State may completely suppress the otherwise protected communication because it proposes activity not entirely lawful in Mississippi.[12]

V.

We do not rest this decision solely on permissible limitations on commercial speech. We also rely on the Twenty-first Amendment, which repealed the national prohibition imposed by the Eighteenth Amendment. Section 2 of the Twenty-first Amendment states: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liqours, in violation of the laws thereof, is hereby prohibited." Of course, the states, through their

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12. For another view, see Op. Tenn. Att'y Gen. (Apr. 11, 1980).

general police power, have the authority to regulate their internal affairs subject to the limitations imposed by the Constitution; but the Twenty-first Amendment gives the states extraordinary regulatory authority when the subject of regulation is alcoholic beverages. California v. La Rue, 409 U.S. 109, 114-15, 34 L. Ed. 2d 342 (1972); Oklahoma Alcoholic Beverage control Board v. Burris, No. 52,197 (Okla. Apr. 15, 1980).[13]

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13. [A]ny analysis of the validity of a state statute regulating liquor does not proceed via the traditional route for testing the constitutionality of state statutes. We must proceed from a vantage point of presumed state power and then ask whether there are any limitations to that power, always keeping in mind that where intoxicating liquors are concerned, great deference must be accorded a comprehensive state regulatory scheme.

Castlewood International Corp. v. Simon, 596 F. 2d 638, 642 (5 Cir. 1979).

The reach of the Twenty-first Amendment is finite; it does not supersede all other constitutional provisions in the area of liquor regulation. La Rue, 409 U.S. at 115. The "Court's decisions...have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause.... Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful." Craig v. Boren, 429 U.S. 190, 206, 50 L. Ed. 2d 397 (1976) (citations omitted). Even then, the Twenty-first Amendment does not vitiate the commerce clause. Each constitutional provision must be read with the other in mind, and their application is dependent on "the issues and interests at stake in any concrete

case." Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332, 12 L. Ed. 2d 350 (1964). See Craig, 429 U.S. at 206; La Rue, 409 U.S. at 115.

In the case sub judice, the Twenty-first Amendment collides not with the commerce clause but with the First Amendment. In La Rue, the Supreme Court confronted a similar situation. Plaintiffs, who operated bars and nightclubs in which other plaintiffs performed lewd dances and various sordid acts with customers sued the California Department of Alcoholic Beverage Control to declare unconstitutional and enjoin enforcement of regulations promulgated by the Department. These regulations prohibited such performances as well as the displaying of films and pictures of them in premises licensed to serve liquor. The Court conceded that the regulations

on their face would proscribe both protected speech and nonprotected, obscene conduct that had an insufficient "communicative element" to be viewed as speech. Id. at 116-18. But the Twenty-first Amendment "strengthened" the states' existing police power in the area of liquor regulation, id. at 115, and the Court could not say that California's choice of methods to alleviate the evil associated with plaintiffs' lascivious conduct was irrational, id. at 116. The Twenty-first Amendment supplied California with the power to prohibit admittedly protected speech in the course of suppressing conduct that does not rise to the level of speech. However, because the state's source of power was the Twenty-first Amendment, it could ban the protected speech along with the unprotected conduct only in

establishments that it had licensed to serve liquor. Id. at 118. The Court held that the regulations did not on their face violate the Constitution.

Only a few years after La Rue the Court cast doubt on the decision in Craig v. Boren, 429 U.S. 190, 50 L. Ed. 2d 397 (1976). Craig involved a sex-based equal-protection challenge to a state statute that permitted females to drink 3.2% beer at age 18 but forbade it to males until they reached age 21. The Court outlined the Twenty-first Amendment's history, id. at 204-07, and concluded that state power under the Twenty-first Amendment traditionally has prevailed over purely economic matters, such as arise in commerce clause/Twenty-first Amendment conflicts, but that

> [c]ases involving individual rights protected by the Due Process

> Clause have been treated in sharp contrast. For example, when an individual objected to the mandatory "posting" of her name in retail liquor establishments and her characterization as an "excessive drink[er]," the Twenty-first Amendment was held not to qualify the scope of her due process rights. Wisconsin v Constantineau, 400 US 433, 436, 27 L Ed 2d 515, 91 S Ct 507 (1971).
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> It is true that California v. LaRue, 409 US 109, 115, 34 L Ed 2d 342, 93 S Ct 390 (1972), relied upon the Twenty-first Amendment to "strengthen" the State's authority to regulate live entertainment at establishments licensed to dispense liquor, at least when the performances "partake more of gross sexuality than of communication," id., at 118, 34 L Ed 2d 342, 93 S. Ct 390. Nevertheless, the Court has never recognized sufficient "strength" in the Amendment to defeat an otherwise established claim of invidious discrimination in violation of the Equal Protection Clause. Rather, Moose Lodge No. 107 v. Irvis, 407 US 163, 178-179, 32 L Ed 2d 627, 92 S Ct 1965 (1972), establishes that state liquor regulatory schemes cannot work indivious discriminations that violate the Equal Protection Clause.

Id. at 207-08. The Court determined the state's discrimination between males and

females with respect to purchasing 3.2% beer to be unconstitutional "irrespective of the operation of the Twenty-first Amendment." Id. at 208 (citations omitted).

It appears that "[n]either the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is

concerned."[14] Id. at 206, quoting P. Brest, Processes of Constitutional Decisionmaking, Cases and Materials 258 (1975). If it were not for La Rue, the reach of the Twenty-first Amendment would not limit the free speech rights embodied in the First Amendment. But from our understanding of Craig, the Supreme Court has not departed from its holding in La

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14. Put another way,

> [f]ederal laws have prevailed over state regulation of intoxicating liquors in only two circumstances: 1) where the state regulation was repugnant to overriding national concern with due process and equal protection, and 2) where the state has sought to invade an area of exclusive federal concern, such as federally owned installations, regulation of commerce with foreign nations, and taxation of imports from foreign countries. Thus, absent a strong federal interest, the state scheme must prevail.

Castlewood International Corp. v. Simon, 596 F. 2d 638, 643 (5 Cir. 1979) (citations omited).

Rue that, in connection with regulation of liquor, the state may incidentally ban protected speech in conjunction with its efforts to prohibit nonprotected communications.

The La Rue principle may also be observed in Die Burg, Inc. v. Underhill, 465 F. Supp. 1176 (M.D. Fla. 1979). It is true that both La Rue and Die Burg involved conduct considered not to be speech because it was obscene. In contrast, the present case involves suppression of printed material for its content rather than for lack of content. But why communications or conduct are regarded as nonspeech -- for example, because they are obscene or, as here, because they promote unlawful activity under the commercial speech doctrine -- is not material to La Rue's holding that when regulation of liquor is at stake,

constitutionally protected as well as nonprotected activity may be banned. As discussed supra, under the commercial speech doctrine, liquor advertising in Mississippi is either not speech at all or is protected speech only in Mississippi's "wet" counties. In either case, Mississippi has the power under the Twenty-first Amendment as construed in La Rue to ban protected speech, if any, as well as unprotected communications when the subject of the message is alcoholic beverages.[15]

In this situation, the inquiry for the court is whether the means the State has chosen to achieve its goal are

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15. The Oklahoma Supreme Court has held that the Twenty-first Amendment gives states the power to forbid liquor advertisements entirely even if they disseminate concededly legal commercial speech. Oklahoma Alcoholic Beverage Control Board v. Burris, No. 52, 197 (Okla. Apr, 1980). We do not construe La Rue so broadly.

rationally related to that purpose. La Rue. That Mississippi could have chosen a less restrictive means to meet its legitimate objective is immaterial. The only issue before the court is whether the means the State did choose -- complete prohibition of liquor advertising -- were unreasonable. La Rue, 409 U.S. at 116. Recalling our discussion supra of Mississippi's interests in protecting its citizens and upholding the law, we cannot conclude that the State's choice of means is irrational. We therefore hold that the Twenty-first Amendment gives Mississippi the power to prohibit completely under Miss. Code Ann. § 97-31-1 The Daily Mississippian's advertising

of liquor and other alcoholic beverages.[16]

VI.

Included in the City of Oxford's answer to plaintiffs' amended complaint is a counterclaim for abuse of process. Plaintiffs have moved to dismiss the counterclaim for failure to state a claim

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16. Plaintiffs also argue, citing no authority, that the City's threatened enforcement of § 97-31-1 against The Daily Mississippian and the Oxford Eagle violates equal protection because the City has taken no action against newspapers published out of state but circulated within the municipal corporate limits. Taking, for the sake of argument, the controversial position that the City's prosecutorial discretion is reviewable, see K. Davis, AdministrativeLaw Treatise ch. 9 (2d ed. 1979), we conclude that no violation of § 1983 has taken place because there is no showing of purposeful discrimination. Williams v. DeKalb County, 582 F. 2d 2 (5 Cir. 1978), citing with approval id., 577 F. 2d 248, 257 (Clark, J., specially concurring). It is undisputed that the City took action against plaintiffs and the Oxford Eagle because citizens complained to City officials about beer advertisements in the local papers.

upon which relief can be granted, Rule 12(b)(6), F. R. Civ. P. We consider the record outside the pleadings in ruling on this motion and therefore view it as one for summary judgment. Rule 12(b), F. R. Civ. P.

Abuse of process is "the intentional use of legal process for an improper purpose incompatible with the lawful function of the process by one with an ulterior motive in doing so, and with resulting damages." Hyde Construction Co. v. Koehring Co., 387 F. Supp. 702, 712-13 (S.D. Miss. 1974), modified but cited with approval sub nom. Dunn v. Koehring Co., 546 F. 2d 1193, 1199, modified sub nom. Hyde Construction Co. v. Koehring Co., 551 F. 2d 73 (5 Cir. 1977). The elements of the tort are:

> (1) that the defendant made an illegal and improper perverted use

> of the process, a use neither warranted nor authorized by the process; (2) that the defendant had an ulterior motive or purpose in exercising such illegal, perverted or improper use of process; and (3) that damage resulted to the plaintiff from the irregularity.

State ex rel Foster v. Turner, 319 So. 2d 233, 236 (Miss. 1975). Accord, State ex rel Richardson v. Edgeworth, 214 So. 2d 579, 586 (Miss. 1968), citing inter alia 1 Am. Jur. 2d Abuse of Process § 4 (1962). The gravamen of the tort is that a party against whom it is committed is forced to do some collateral thing outside the regular purview of the process that he would not ordinarily be required to do. 1 Am. Jur. 2d Abuse of Process § 4 (1962). Examples of abuse of process include attempting to enforce a judgment known to be false, fraudulent, or nonexistent, id. § 12, and using an arrest warrant to extort property or compel some act, id. § 14.

The City pleads that plaintiffs' actions constitute an abuse of process because plaintiffs amended their complaint to allege that they wish to advertise liquor other than beer in the future. In essence, the City contends that plaintiffs made this allegation only to keep their lawsuit alive after this court dismissed the original complaint for lack of case or controversy. The City argues that plaintiffs' allegation is vexatious and frivolous because the City has repeatedly assured plaintiffs that it has no intention of interfering with their constitutional rights and never has had such an intention. Thus, concludes the City, plaintiffs have not maintained this lawsuit in good faith.

The facts of record do not agree with the City's allegations. The City's position on enforcement of Miss. Code

Ann. § 97-31-1 has been at best ambiguous. As discussed supra, the City warned plaintiffs first through a police officer and then by letter that they should cease advertising beer and other intoxicating beverages. The letter specifically mentions liquor and cites § 97-31-1, which forbids inter alia the advertising of liquor. It is true that The Daily Mississippian has not advertised liquor in the past, but it is equally true that should it do so in the future such conduct would fall within the prohibition of § 97-31-1. The City has not unequivocably stated that it will never prosecute plaintiffs. It has merely stated that it may or may not, depending upon the result of the Southern District case. Plaintiffs' actions constitute a reasonable response to a threatening situation. No evidence in the record

indicates that bad faith has motivated continuation of this lawsuit after dismissal of their original complaint.

Even had plaintiffs maintained suit through bad faith, a claim for abuse of process would not lie. Conceding for the sake of argument that plaintiffs amended their complaint in part for the purpose of harassing the City, a threat to them by virtue of advertisements they desire to publish nonetheless remained. It is clear that when a party uses process because of an ulterior motive but nevertheless uses the process for its intended, legitimate purpose, no liability exists. State ex rel. Foster v. Turner, 319 So. 2d 233 (Miss. 1975); 1 Am. Jur. 2d Abuse of Process § 13 (1962). Regardless of whatever ancillary reasons plaintiffs had for continuing this lawsuit, the legitimate purpose remains.

We therefore grant plaintiffs summary judgment on the City's counterclaim for abuse of process.[17]

Let judgment be entered accordingly.

This 2nd day of May, 1980.

/s/William C. Keady
Chief Judge
United States District Judge

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17. In response to plaintiffs' memorandum of law, the City insists that its counterclaim is for abuse of process rather than malicious prosecution. The difference between the two is that malicious prosecution concerns "maliciously causing process to issue," while abuse of process concerns "the improper use of process after it has been issued." Turner, 319 So. 2d at 236. To the extent that the City pleads an action for malicious prosecution as well as abuse of process, we grant plaintiffs summary judgment for the reasons stated in text.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI WESTERN DIVISION

KATHY DUNAGIN, et al., Plaintiffs

V.

THE CITY OF OXFORD, MS., et al., Defendants

JUDGMENT

In accordance with the Memorandum of Decision this date released, it is

ORDERED:

1. That defendant State of Mississippi's motion to stay or dismiss this action be and the same is hereby denied.

2. That defendants' motion for summary judgment on plaintiffs' claim be and the same is hereby granted. The court sustains the constitutionality of Miss. Code Ann. § 97-31-1 declaring unlawful

the circulation, publishing and exposing for sale of liquor advertisements other than beer as applied to The Daily Mississippian, a newspaper published by students of the University of Mississippi at Oxford, Mississippi, and the amended complaint filed herein is dismissed with prejudice.

3. That plaintiffs' motion for summary judgment on the counterclaim of defendants City of Oxford et al. be and the same is hereby granted, and that the counterclaim be and the same is dismissed with prejudice.

Each party shall bear its own costs.

ORDERED this 2nd day of May, 1980.

/s/William C. Keady
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI WESTERN DIVISION

KATHY DUNAGIN and
GLENN ALLISON, et al., Plaintiffs

V. No. WC79-83-WK-P

THE CITY OF OXFORD,
MISSISSIPPI, et al., Defendants

and

STATE OF MISSISSIPPI, Defendant-Intervenor

MEMORANDUM ORDER

On May 2, 1980, we granted summary judgment upholding the constitutionality of Miss. Code Ann. § 97-31-1 in the face of plaintiffs' First Amendment attack, and dismissed the amended complaint with prejudice. After amendment of judgment not material here, we now consider plaintiffs' motion

further to amend judgment by awarding them attorneys' fees against defendant City of Oxford pursuant to 42 U.S.C. § 1988.

Plaintiffs originally brought suit to declare unconstitutional § 97-31-1, which prohibits advertising of alcoholic beverages, so that they could advertise beer in The Daily Mississippian, the University of Mississippi's student newspaper. After initial opposition, defendants State of Mississippi and City of Oxford conceded that § 97-31-1 does not forbid beer advertising but does prohibit advertising of other alcoholic beverages. Confronted with dismissal for lack of case or controversy, plaintiffs amended their complaint to allege that they wished to advertise alcoholic beverages other than beer. The court granted plaintiffs'

motion to certify this cause as a class action. Cross-motions for summary judgment on the dispute's merits were subsequently filed. The court sustained §97-31-1's constitutionality, although it ruled in favor of plaintiffs on defendant State's motion to stay proceedings pending the outcome of a similar case, brought in United States District Court for the Southern District of Mississippi, and on defendant City of Oxford's counterclaim for abuse of process.

The court's rationale for upholding § 97-31-1 was that because the sale and possession of liquor is legal in only approximately half of Mississippi's 82 counties, liquor advertising promotes activity not entirely legal within the state. Citing Virginia State Board of Pharmacy v.

Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 759, 48 L.ed. 2d 346 (1976), we concluded that liquor advertisements in Mississippi are "either not speech protected by the First Amendment or speech that the state may nonetheless ban because of its contents." Memorandum of Decision at 13 (May 2, 1980). See id. at 17. We also relied on California v. La Rue, 409 U.S. 109, 34 L. ed. 2d 342 (1972), to buttress our conclusion, interpreting it to hold that the Twenty-First Amendment gives the states extraordinary regulatory authority over alcoholic beverages such that "in connection with regulation of liquor, the state may incidentally ban protected speech in conjunction with its efforts to prohibit nonprotected communications." Memorandum of Decision at 21 (May 2, 1980).

Plaintiffs' motion to recover attorneys' fees as costs under 42 U.S.C. § 1988 is bifurcated. They contend that they should receive all attorneys' fees expended up to the time they amended their complaint to include liquor advertising because defendants conceded under state law that plaintiffs had a right to advertise beer. Post-amendment, plaintiffs continue, they should receive partial fees because they prevailed on all issues other than § 97-31-1's constitutionality, viz., plaintiffs' class-certification motion, defendant State's motion to stay, and defendant City's abuse-of-process counterclaim. The City responds that §§ 1983 and 1988 require plaintiffs to prevail on a federal right to recover attorneys' fees in the "beer only" phase of the suit. Because they succeeded only in enforcing a state

right, the city concludes, an award of attorneys' fees in not permissible. After plaintiffs amended their complaint to include alcoholic beverages other than beer, the city urges, plaintiffs lost the central issue in the case -- § 97-31-1's constitutionality -- and so cannot be viewed as prevailing parties under § 1988.

In material part, 42 U.S.C § 1988 provides: "in any action or proceeding to enforce a provision of section[] . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." Section 1983 creates a cause of action in favor of any person who, under color of state action, is deprived "of any rights, privileges, or immunities secured by the Constitution and laws." It is clear that § 1983 is a vehicle for

the redress only of federal rights, see Maine v. Thiboutot, 48 U.S.L.W. 4859 (S. Ct. June 25, 1980), and does not protect state rights. See e.g., Baker v. McCollan, 443 U.S. 137, 61 L. ed. 2d 433 (1979). Plaintiffs do not dispute this principle. Rather, they take the tack that because the State of Mississippi permits beer advertising, the First Amendment protects plaintiffs' right to advertise beer.

We reject this view. Under the rationale of our decision on the merits, Mississippi has the power to regulate the advertisement of all alcoholic beverages, including beer, because their possession and sale is illegal in approximately half

the state's counties.[1] This power to regulate includes the power to ban absolutely any alcoholic beverage advertising within the state. Any right to advertise alcoholic beverages in Mississippi exists only by grace of the Mississippi Legislature. It is therefore a state right, not a federal right and because it exists only by whim of the

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1 Beer, though § 97-31-1 permits its advertising, is nevertheless an alcoholic beverage. Miss. Code Ann. § 67-3-1 et seq. establishes a local option scheme for beer similar to that for liquor established by § 67-1-1 et seq. the city has furnished us with statistics showing that in substantial areas of Mississippi possession and sale of beer is illegal under the local-option law. Although these statistics were appended only to the city's memorandum of law and therefore are not part of the record, we take judicial notice that in fact in a substantial portion of Mississippi possession and sale of beer is illegal. Thus, the rationale we applied to alcoholic beverages in our decision on the merits governs with equal force regulation of beer advertising.

legislature, the First Amendment does not protect it.

Under this view, plaintiffs succeeded in the initial phase of the lawsuit in enforcing a state statutory right to advertise beer. They may not recover attorneys' fees because §§ 1983 and 1988 require them to prevail in enforcing a federal right to recover them. We additionally conclude that this same reasoning precludes recovery of attorneys' fees in the "post-beer" phase of suit. Although plaintiffs prevailed on certain peripheral issues, this success did not produce any improvement in their condition vis-a-vis their condition prior to suit, for plaintiffs were defeated in their constitutional attack on § 97-31-1's ban on liquor advertising. Under the rationale of our decision, their attack failed because the

court found that no federal right to advertise alcoholic beverages existed and therefore that there was no such right to enforce. Predicated as it is on enforcement of federal rights, § 1983 coupled with § 1988 fails to open plaintiffs an avenue to attorneys' fees in this cause.

It is accordingly

ORDERED:

That plaintiffs' motion to amend judgment to award attorneys' fees as costs be and same hereby is denied.

THIS 18th day of August, 1980.

/s/ WILLIAM C. KEADY
Chief Judge
United States District Court

Supreme Court, U.S.
FILED
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CLERK

NO. 83-1221
~~NO. 83-1244~~

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

KATHY DUNAGIN, ET AL.,
Petitioners

v.

CITY OF OXFORD, MISSISSIPPI, ET AL.,
Respondents

LAMAR OUTDOOR ADVERTISING, INC., ET AL.,
Petitioners

v.

MISSISSIPPI STATE TAX COMMISSION, ET AL.,
Respondents

ON PETITIONS FOR WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Are laws of the State of Mississippi, which prevent media advertisers located within the State from originating liquor advertisements in Mississippi and which were enacted pursuant to the State's legitimate and substantial interest in controlling the artificial stimulation of liquor sales and consumption created by the advertisement of liquor and its police power to control liquor within its borders, augmented by the Twenty-first Amendment, constitutional under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment?

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STATEMENT OF THE CASE

I. The Challenged Mississippi Liquor Advertising Laws

The Mississippi liquor advertising statutes and regulations that are being challenged in Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Commission ("Lamar"), No. 83-1224, and Dunagin v. City of Oxford ("Dunagin"), No. 83-1221, are an integral part of Mississippi's comprehensive regulatory scheme for controlling liquor1/ within its borders, known as the Local Option Alcoholic Beverage Control Law ("Local Option Law"), enacted in 1966. This act is the product of an historic compromise among several competing economic and political

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1/ "Liquor," as used in this Brief, means distilled spirits and wine above 4% alcohol by weight. See Miss. Code Ann. § 67-1-5 (Supp. 1983).

factions within Mississippi, which gave individual counties and judicial districts the opportunity to end the dichotomy between de jure statewide prohibition of liquor, which had been in effect for 58 years, and the illegal de facto availability of liquor.

The Local Option Law makes it clear that prohibition of liquor remains Mississippi's overriding policy and the central purpose of the legislation:

> The policy of this state is reannounced in favor of prohibition of the manufacture, sale, distribution, possession, and transportation of intoxicating liquor.... The purpose and intent of this chapter is to vigorously enforce the prohibition laws throughout the state, except in those counties voting themselves out from under the prohibition law in accordance with the provisions of this chapter, and, in those counties, to require strict regulation and supervision of

> the manufacture, sale, distribution, possession and transportation of intoxicating liquor....

Miss. Code Ann. § 67-1-3 (1972) (emphasis added).

The Local Option Law allows a county, or a judicial district within a county, to bring itself out from under statewide prohibition by an affirmative majority vote of the electors within the county or judicial district. Miss. Code Ann. § 67-1-11, -13 & -15 (1972). If the county or judicial district vote rejects coming out from under prohibition, or if an election is not held, the statewide prohibition laws remain in force and all aspects of liquor continue to be prohibited within that county or judicial district. If a county or judicial district votes itself

out from under the statewide prohibition, then, subject to all of the "provisions and restrictions" of the Local Option Law, the "possession and transportation" of liquor is legal throughout the county or judicial district while the "manufacture, sale, and distribution" of liquor is lawful, but only within the incorporated municipalities, qualified resort areas, and clubs of the county or judicial district as opposed to the county as a whole. Miss. Code Ann. § 67-1-7 (1972).

At the time of the Lamar trial, thirty-five "dry" Mississippi counties and four judicial districts in four other counties had not voted to legalize liquor while forty-three "wet" counties and four judicial districts in

four other counties had voted to legalize liquor to the extent permitted by the Local Option Law. Lamar R. Vol. IV, pp. 134, 135; Trial Exh. D-5.

During consideration of the Local Option Law legislation by the Mississippi House of Representatives in 1966, more than 30 amendments were offered on the floor of the House. Amendment No. 24 amended Section 31 of the bill by adding a new paragraph which read as follows:

> "It shall be unlawful to advertise alcoholic beverages by means of signs, billboards, or displays on or along any road, highway, street, or building."

Journal of the Mississippi State House of Representatives, 1966, p. 765. The amendment was incorporated as the second paragraph of Miss. Code Ann. § 67-1-85

(1972). Amendment No. 25 amended subsection (5) of Section 16 of the local option bill and read as follows:

> (5) To issue Rules prohibiting the advertising of alcoholic beverages in the State in any class of media and to provide further that all advertising of the retail price of alcoholic beverages shall be prohibited except on placards or signs in the interior of licensed premises which are not visible from the exterior.

Id. This amendment language is presently codified as subsection (e) of Miss. Code Ann. § 67-1-37 (1972). These two provisions, Miss. Code Ann. § 67-1-85 and 67-1-37(e) (1972), along with Regulation No. 6 of the Alcoholic Beverage Control Division of the Mississippi State Tax Commission, promulgated pursuant to Section 67-1-37(e), are the operative

statutes and regulations challenged in Lamar and Dunagin.2/ The specific adoption of these provisions as amendments is explicit evidence of legislative intent to weave the control of liquor advertising into the compromise scheme of balancing prohibition with "strict regulation and supervision of the manufacture, sale, distribution, possession and transport of intoxicating liquor." Miss. Code Ann. § 67-1-3 (1972).

The importance of the liquor advertising statutes to the eventual passage of the Local Option Law was confirmed

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2/ The Dunagin Petitioners expressly challenge only Miss. Code Ann. § 97-31-1 (1972), a statute which predates the Local Option Law and which has been limited in scope to the provisions of the Local Option Law. See Miss. Code Ann. § 67-1-3 (1972).

and underscored by the testimony of Robert L. Livingston, former Director of the Alcoholic Beverage Control Division of the Mississippi State Tax Commission, in the Lamar trial. Mr. Livingston testified in pertinent part as follows:

> Q (Resuming) Mr. Livingston, specifically now with regard to the provisions of the Alcohol Beverage Control Law that are attacked in this lawsuit, the advertising provisions, what were the origins of those provisions in the 1966 legislative session?
>
> . . .
>
> A The origins, or the idea behind these provisions was one of strict control, that if Mississippi was ever to join the rest of the nation as a state with legalized liquor, we had to show the people that it would be possible to control it and handle it to their satisfaction so that there would be neither promotion nor encouragement of what

was a controversial subject at that time and what still is.

. . .

Q (Resuming) Mr. Livingston, what was the purpose of the alcoholic beverage advertising provisions of the Local Option Law?

. . .

A I think that it is important to know that we wouldn't have legal alcohol in the State of Mississippi today if there had not been severe controls and restrictions placed on the field of advertising.

Lamar R. Vol. IV at pp. 127, 128, 129 (emphasis added).

After passage of the Local Option Law, the Mississippi State Tax Commission implemented Miss. Code Ann. § 67-1-37(e) (1972) by promulgating its Regulation No. 6, which provides:

> [N]o person, firm or corporation shall originate advertisement in this State, dealing with alcoholic beverages by any means whatsoever, including but not limited to newspapers, radio, television, circular, dodger, word of mouth, signs, billboards, displays or any other advertising media.... (emphasis added)

The State Tax Commission has interpreted the words, "originate advertisement in this State," in Regulation No. 6 to mean that the central place of publication or dissemination of the liquor advertisements must be within the physical boundaries of the State of Mississippi in order for Regulation No. 6 and the other challenged statutes and regulations to apply. Lamar R. Vol. J, pp. 166-167. Thus, the operative Mississippi laws challenged herein ban only in-state liquor advertising - those advertisements of liquor physically

originating in the State of Mississippi.3/

II. Lamar District Court Proceedings

The 56 Lamar Petitioners, consisting of outdoor advertisers and print and electronic media advertisers, filed this action in the United States District Court for the Southern District of Mississippi, Jackson Division, on November 1, 1978. This action was filed in order to challenge the Mississippi statutes and regulations banning liquor advertisements which originate within the State of Mississippi on the basis that such statutes and regulations

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3/ Regulation No. 6 does allows the advertisement of liquor within the confines of the state licensed retail package stores as a means of providing consumer information at the point of sale.

constitute an abridgement of commercial speech and a denial of equal protection under the law in violation of the First and Fourteenth Amendments. Petitioners sought a declaratory judgment that the challenged statutes and regulations were unconstitutional and a prohibitory injunction enjoining the Respondents from attempting to enforce them.

Federal jurisdiction was invoked under 28 U.S.C. §§ 2201, 2202, 1331 and 1343 and 42 U.S.C. § 1983.

In 1979 both Petitioners and Respondents moved for summary judgment. Both motions were denied. The case was then tried before the district court, sitting without a jury, on March 11-12, 1981. The opinion of the district court, which

appears as Appendix D to the Lamar Petition, held that Mississippi's ban on intrastate liquor advertising violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, since the ban "in no way rationally furthers the state's interest in controlling the artificial stimulation of the sale and consumption of alcoholic beverages." 539 F. Supp. 830-31, App. C at 221a. The Respondents appealed to the United States Court of Appeals for the Fifth Circuit.

III. Dunagin District Court Proceedings

The Dunagin Petitioners in this case are the certified class of past, present and future editors and business managers of the Daily Mississippian, a student-

operated newspaper at the University of Mississippi in Oxford, Mississippi. After the Daily Mississippian ran beer advertisements, an Oxford city policeman visited the offices of the Daily Mississippian and advised the editor that the paper should cease advertising beer because state law prohibited it. On April 1, 1979, Petitioners received from Gerald Gafford, as attorney for Respondent City of Oxford, a letter dated March 29, 1979. The letter stated that "[t]his is a request that you consider the adoption of a policy which would eliminate the advertisement of intoxicating beverages in your paper." Dunagin v. City of Oxford, 489 F. Supp. 763, 766 (N.D. Miss. 1980). The Petitioners responded by filing suit in the United States

District Court for the Northern District of Mississippi on June 7, 1979, seeking injunctive relief against the City, a declaration that the statute was unconstitutional, certification as a class action, and attorney's fees pursuant to 42 U.S.C. § 1988. The Petitioners invoked the court jurisdiction under 28 U.S.C. §§ 1331 and 1343(3) for a cause of action under 42 U.S.C. § 1983.

On June 27, 1979, the Respondent State of Mississippi moved to intervene as a defendant and this motion was granted on June 29, 1979. Also on June 29th, the City of Oxford stipulated ex parte that it would not instigate legal proceedings pending the outcome of the district court action.

On July 3, 1979, the City of Oxford

filed its answer in which it contended that Miss. Code Ann. § 97-31-1 (1972) prohibits beer advertisements. The State of Mississippi, however, contended in a summary judgment motion that the statute did not prohibit beer advertisements and on that basis claimed that there was no case or controversy and moved for dismissal. The district court granted the State's summary judgment motion on January 10, 1980, holding that beer advertising is not restricted in Mississippi,4/ although Petitioners were allowed to amend their complaint to specifically allege an intent to challenge the statute as it prohibited liquor

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4/ Dunagin v. City of Oxford, 489 F. Supp. 763, 767, n.4 (N.D. Miss. 1980). See 1934 Miss. Laws Ch. 172 (amending Miss. Code Ann. § 97-31-1 (1972) to permit beer advertising).

advertisements. The amended complaint was filed on January 23, 1980.

On February 27, 1980, the district court granted Petitioners' motion for class certification and certified a plaintiff class of all past, present, and future students elected or appointed to an editorial or business manager position with the Daily Mississippian. On May 2, 1980, the district court entered summary judgment for the Respondents, declaring Miss. Code Ann. § 97-31-1 (1972) to be constitutionally valid under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. From this order, the previous order dismissing the suit for lack of case or controversy, and the order denying Petitioners an award

of attorney's fees, the Petitioners appealed to the United States Court of Appeals for the Fifth Circuit.

IV. Consolidated Proceedings in the Court of Appeals

On appeal to the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit"), Lamar and Dunagin were consolidated after the submission of Dunagin to a panel of the Court was vacated due to the death of one of the panel members. A panel of the Court of Appeals heard the consolidated appeal and decided that the challenged laws and regulations were an unconstitutional restriction of commercial speech but did not resolve the issue of whether the restriction also violated the Equal Protection Clause. 701 F.2d at 334 n.29, App. B at 158a, n.29.

Before delivery of the panel opinion, the United States Court of Appeals for the Tenth Circuit issued a conflicting opinion5/ upholding an Oklahoma law which banned all liquor advertisements originating in the intrastate and interstate commerce against a First Amendment challenge by cable television companies. Pursuant to the rules of the Fifth Circuit governing the issuance of opinions in conflict with a decision of another circuit, a rehearing en banc was ordered, and the panel opinion was vacated.6/

The en banc Court concluded that the

5/ Oklahoma Telecasters Ass'n. v. Crisp, 699 F.2d 490 (10th Cir.), cert. granted sub. nom., Capital Cities Cable, Inc. v. Crisp, ____ U.S. ____, 104 S.Ct. 66, 77 L.Ed. 2d ____ (1983).

6/ 718 F.2d at 315, n.2, App. A at 3a, n.2.

Mississippi regulatory scheme violated neither the First Amendment nor the Equal Protection Clause of the Fourteenth Amendment, reversed the judgment of the Lamar district court and upheld the judgment of the Dunagin district court. Dunagin v. City of Oxford, 718 F.2d 738 (5th Cir. 1983) (en banc); Lamar App. A at 1a-72a; Dunagin App. at 1-85.

The Court of Appeals ruled that "[w]e base our decision, ultimately, upon the application of the Supreme Court's analysis in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed. 2d 341 (1980)," and acknowledged that this Court's recent commercial speech decision, Bolger v. Youngs Drug Products Corp., _____ U.S.

____, 103 S.Ct. 2875, 2882, 77 L.Ed. 2d 469 (1983), "reaffirmed the Central Hudson Gas test as the basic method of deciding commercial speech cases." 718 F.2d at 747, 748. Analyzing the challenged Mississippi liquor advertising laws under the four elements of the Central Hudson test, the Court of Appeals held that such laws did not violate the Petitioners' alleged First Amendment rights. See 718 F.2d at 747-751; Lamar App. A at 33a-53a; Dunagin App. at 42-64.

Although not relied on as the basis for the Court's First Amendment analysis, California v. LaRue, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed. 2d 342 (1972), New York State Liquor Authority v. Bellanca, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed. 2d 357 (1981), and Queensgate

Investment Co. v. Liquor Control Commission, 69 Ohio St. 2d 361, 433 N.E.2d 138, appeal dismissed, ____ U.S. ____, 103 S.Ct. 31, 74 L.Ed. 2d 45 (1982), were discussed by the Court as providing "an added presumption of validity" for state liquor regulations, consistent with its previous ruling in Castlewood International Corp. v. Simon.7/ 718 F.2d at 746, 750, Lamar App. A at 47a-48a; Dunagin App. at 58.

In ruling on the Lamar Petitioners' equal protection claim, the Fifth Circuit rejected the applicability of the strict scrutiny standard of review. The Court held that (1) there can be no

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7/ 546 F.2d 638 (5th Cir. 1979), vacated and remanded, 446 U.S. 949, 100 S.Ct. 2914, 64 L.Ed. 2d 806 (1980), panel opinion reinstated, 626 F.2d 1200 (5th Cir. 1980).

infringement of a fundamental right since the Court found that no First Amendment rights were violated and (2) commercial speech, in contrast to ideological speech, is entitled to only a "limited measure of protection" under the First Amendment. Additionally, the Court found that in-state and out-of-state advertisers are not similarly situated classes. The Court ultimately held that the Mississippi liquor advertising laws do not violate the Equal Protection Clause under the rational basis standard of review. 718 F.2d at 752, 753; Lamar App. A at 58a-61a; Dunagin App. at 70-73.

REASONS FOR DENYING THE WRITS

It is undisputed that the Fifth Circuit's en banc decision presents no conflict with the decision of any other court of appeals. This Brief will demonstrate that the Lamar and Dunagin Petitions establish no conflict with the applicable decisions of this Court and present no important questions of federal law which should be settled by this Court.

I. Contrary to the Petitioners' Contentions, the Fifth Circuit Did Not Alter the Standard of Review or Shift the Burden of Proof Regarding the Constitutionality of the Challenged Mississippi Liquor Advertising Laws, But Applied the Central Hudson Standard in Harmony With the Analogous Commercial Speech Decisions of this Court.

The Lamar and Dunagin Petitioners (collectively referred to as "the Petitioners") request this Court to review the Fifth Circuit en banc deci-

sion because they claim the decision alters the standard of review and shifts the burden of proof which would otherwise apply to commercial speech restrictions. Specifically, the Petitioners claim that the Fifth Circuit analyzed the constitutionality of the challenged Mississippi liquor advertising laws under the deferential rational basis standard of review rather than the four-part test8/ for commercial speech set

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8/ This four-part test is summarized as follows: (1) the expression must be related to illegal activity and must not be misleading; (2) the asserted governmental interest must be substantial; (3) the regulation must directly advance the asserted governmental interest asserted; and (4) the regulation must be no more extensive than necessary to serve that interest. Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed. 2d 341, 351 (1980).

forth in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed. 2d 341 (1980). Lamar Petition at 10, 14; Dunagin Petition at 15. Although the Respondents vigorously submit that the Fifth Circuit should have applied the rational basis test standard of review due to the state's police power over liquor within its borders, augmented by the Twenty-first Amendment,9/ the Court did not do

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9/ A full discussion of this important issue is not necessary to the purpose of this Brief since the Court applied the Central Hudson standard. However, Respondents point out that no one disputes that a state may maintain a complete prohibition of all incidents of liquor pursuant to its police power. E.g., New York State Liquor Authority v. Bellanca, 452 U.S. 714, 715, 101 S.Ct. 2599, 2600, 69 L.Ed. 2d 357, 360 (1981). Therefore, the State's authority to completely prohibit liquor alto-

so. Thus, Petitioners present no basis for certiorari review.

The Fifth Circuit expressly held in its en banc decision that "[w]e base our

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gether necessarily provides it the lesser included power to condition the availability of liquor on the absence of advertising. See Ziffrin v. Reeves, 308 U.S. 132, 138, 60 S.Ct. 163, 167, 84 L.Ed. 128, 135 (1939); Premier-Pabst Sales Co. v. State Board of Equalization, 13 F. Supp. 90, 95-96 (S.D. Cal. 1935) (three-judge court). This is particularly true in Mississippi where part of the quid pro quo for legalization of liquor sales and consumption was the absence of advertising. This police power is augmented by the Twenty-first Amendment, as this Court held in Bellanca and other decisions. Furthermore, Bellanca made it clear that, in conflicts between a lower protected form of speech, such as nude dancing and commercial advertising, and a state's authority to control liquor, the rational basis standard is applicable. Under this minimum scrutiny, the challenged Mississippi laws are clearly constitutional.

decision, ultimately, upon the application of the Supreme Court's analysis in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York [citation omitted]." 718 F.2d at 746-747; Lamar App. A at 32a; Dunagin App. at 41. This standard of review was acknowledged by the Court of Appeals "as the basis method of deciding commercial speech cases," citing Bolger v. Youngs Drug Products Corp., ____ U.S. _____, 103 S.Ct. 2875, 77 L.Ed. 2d 469 (1983). 718 F.2d at 747; Lamar App. A at 33a; Dunagin App. at 41-42. The Fifth Circuit analyzed the challenged Mississippi laws under each of the four elements of the Central Hudson test and correctly found that these laws pass constitutional muster despite the

Petitioners' claims of First Amendment protection.

Since it is evident that the Fifth Circuit utilized the Central Hudson commercial speech test in reaching its conclusion that the Mississippi laws are constitutional, the Petitioners are reduced to claiming that the Fifth Circuit misapplied the Central Hudson standard. The Lamar Petitioners concede that merely the misapplication of the Central Hudson test would not merit this Court's exercise of certiorari review:

> If the proper standard of review for restrictions on truthful advertising of legally available products had merely been misapplied, then the error committed by the Fifth Circuit in upholding, as constitutional, Mississippi's ban on liquor advertising might not merit this Court's attention.

Lamar Petition at 10,11. Thus, the Lamar Petitioners acknowledged that the misapplication of the Central Hudson test to the facts of these cases would represent neither a conflict with the decisions of this Court nor a sufficiently important question for this Court to review. This is a correct assessment. Such a review would involve primarily the interests of the parties under the specific provisions of the Mississippi liquor advertising laws. This Court has held that its certiorari jurisdiction will be exercised to review only those cases which involve "principles, the settlement of which are of importance to the public as distinguished from that of the parties." National Labor Relations Board v. Pittsburgh Steamship Co., 340 U.S. 498, 502, 71

S.Ct. 453, 456, 95 L.Ed. 479, 482 (1951). Accord, Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74, 75 S.Ct. 614, 616, 99 L.Ed. 897, 901 (1955) (This Court will not grant certiorari to review a case "for the benefit of the parties litigant."). Thus, this Court should not issue a writ of certiorari to review the Fifth Circuit's decision that the challenged Mississippi laws pass muster under the Central Hudson commercial speech test.

The Petitioners also improperly argue that the Fifth Circuit misapplied the Central Hudson test to the facts of these cases. Although this argument does not present a legitimate issue for certiorari review, this Brief will demonstrate that the Fifth Circuit's en banc decision correctly applied the ele-

ments of the Central Hudson test that are contested by the Petitioners and followed the reasoning of analogous commercial speech decisions of this Court in doing so.

The Fifth Circuit first held that liquor advertisements in Mississippi "should be treated at the outset as protected commercial speech." 718 F.2d at 747; Lamar App. A at 33a; Dunagin App. at 42. Under this threshold element of the Central Hudson test, the Fifth Circuit disagreed with Respondents in holding that the liquor advertisements sought to be disseminated by Petitioners are not related to illegal activity and are not misleading. 718 F.2d at 742, 743;10/ Lamar App. A at 15a-19a; Dunagin App. at 21-25.

The Court of Appeals next confirmed that "[t]here can be no question ... that Mississippi does assert a substantial interest, which the state describes to be 'safeguarding the health, safety and general welfare of its citizens by controlling the artificial stimulation of liquor sales and consumption created by the advertising of liquor.'" 718 F.2d at 747; Lamar App. A at 33a-34a;

10/ A discussion of this aspect of the Court's decision is unnecessary to the purpose of this Brief. However, Respondents continue to vigorously assert that Petitioners' liquor advertisements are not entitled to further analysis under the remaining Central Hudson elements because these advertisements are related to illegal activity in Mississippi, half the counties of which are "dry," and are inherently misleading, providing no information regarding the undisputed dangers of alcohol consumption.

Dunagin App. at 42.11/ As evidence of the substantial nature of the State's interest, the Court referred to the undisputed testimony in the Lamar trial regarding the problems that alcohol abuse causes in our society, such as "coronary heart disease, gastrointestinal cancer, cirrhosis of the liver, traffic accidents, and occupational and family problems." 718 F.2d at 747; Lamar App. A at 34a; Dunagin App. at 43. In fact, the Lamar Petitioners, as well as all previous court decisions in these cases, have agreed that the State's interest is substantial.

11/ Although without merit, the Dunagin Petitioners' argument, at page 12 of their Petition, that the State's interest is insubstantial has not been previously raised and is therefore improper.

Central Hudson itself supports the substantiality of the State's interest in suppressing demand for liquor created by advertising as part of its regulatory scheme for controlling the undisputed problems created by liquor consumption. In Central Hudson, this Court agreed that "the state's interest in conserving energy is sufficient to support suppression of advertising designed to increase consumption of electricity" and, due to the importance of energy consumption, the state's interest was deemed substantial. Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 568, 100 S.Ct. 2343, 2352, 65 L.Ed. 2d 341, 352 (1980). Analogously, the significant problems associated with liquor consumption are sufficient to

support suppression of advertising designed to increase consumption of liquor.

Under the third element of the Central Hudson test, the Court held that Mississippi's liquor advertising laws directly advance the state's substantial interest in controlling such advertising. 918 F.2d at 747-751; Lamar App. A at 34a-49a; Dunagin App. at 43-60. The Fifth Circuit expressly followed the reasoning of this Court in Central Hudson and in Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed. 2d 800 (1981), in reaching this conclusion. 718 F.2d at 749-95; Lamar App. A at 4a-47a; Dunagin App. at 54-58.

In Central Hudson, this Court judicially noticed "an immediate connection between advertising and demand for

electricity" and thus held that there was a "direct link between the state interest in conservation and the Commission's order," which banned promotional advertising by electric utilities. Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 569, 100 S.Ct. 2343, 2353, 65 L.Ed. 2d 341, 353 (1980). Similarly, in Metromedia, this Court agreed with the "accumulated, common sense judgments of [the] local lawmakers" that "a legislative judgment that billboards are traffic hazards is not manifestly unreasonable" and that "[i]t is not speculative to recognize that billboards by their very nature ... can be perceived as aesthetic harm." 453 U.S. at 509, 510, 101 S.Ct. at 2893-2894, 69 L.Ed. 2d at 815, 816.

Thus, this Court held in Metromedia that San Diego's billboard ban directly advanced its substantial governmental interest of traffic safety and aesthetic appearance under the Central Hudson test. Drawing its analysis from these decisions,12/ the Fifth Circuit in these cases properly held that "sufficient reason exists to believe that advertising and consumption are linked to justify the ban, whether or not 'concrete scientific evidence' exists to that effect." 718 F.2d at 750; Lamar App. A at 47a; Dunagin App. at 58.

12/ The Fifth Circuit also found persuasive the decisions of other courts that have considered the connection between advertising and consumption and found a direct link. See 718 F.2d at 747-748; Lamar App. A at 35a-37a; Dunagin App. at 44-46.

In so holding, the Fifth Circuit properly rejected the Lamar Petitioners' claim that the Respondents must provide "concrete scientific evidence" to substantiate the relationship between liquor advertising and consumption. As the Fifth Circuit recognized, this relationship between advertising and consumption is a "legislative" or "constitutional" fact issue which is bound up in the constitutional judgment that the appellate court must make independently of the district court's findings. 718 F.2d at 748, n.8; Lamar App. A at 40a; Dunagin App. at 50. See Ohralik v. Ohio State Bar Association, 436 U.S. 437, 463, 98 S.Ct. 1912, 1922, 56 L.Ed. 2d 454, 458 (1978); Fortin v. Darlington Little League, Inc., 514 F.2d 344, 348-349 (1st Cir. 1975); see also,

Drope v. Missouri, 420 U.S. 162, 175, n.10, 95 S.Ct. 896, 905, n.10, 43 L.Ed. 2d 103, 115, n.10 (1975). Scientific proof is not required to establish this legislative fact as this Court made clear in Central Hudson and, as taught in Metromedia, the judgment of the Mississippi Legislature that the ban on intrastate advertising decreases the stimulation of liquor sales and consumption is entitled to great weight.

For the same reason, the Fifth Circuit properly rejected the Lamar district court's conclusions that the state is "inundated" and "saturated" with out-of-state liquor advertisements and thus that the liquor advertising laws do not directly advance the State's interest. This conclusion was not a finding of fact entitled to "clearly

erroneous" review as the Lamar Petitioners apparently claim. See Lamar Petition at 12. The Fifth Circuit was required to reach its own conclusion regarding this legislative fact issue.12/

The Court cited several reasons in support of its conclusion. First, echoing the conclusion of this Court in Central Hudson, the Court of Appeals recognized that the Petitioners "would not be pursuing this case so vigorously if the market were truly saturated." 718 F.2d at 750; Lamar App. A at 48a;

12/ In fact, the Lamar district court's statement was included in the "Conclusions of Law" section of its opinion. Of course, the clearly erroneous rule does not apply to conclusions of law. E.g., 5A Moore, Federal Practice ¶ 52.03[2], at p. 2662 (1983).

Dunagin App. at 59. See Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 569, 100 S.Ct. 2343, 2353, 65 L.Ed. 2d 341, 353 (1980) ("Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales.").

Secondly, the Lamar Petitioners' "evidence that liquor advertising appeared in national magazines in the Jackson [Mississippi] library, out-of-state radio and television broadcasts and out-of-state newspapers does not establish that advertising will not dramatically increase if the intrastate ban is invalidated." 718 F.2d at 750-751; Lamar App. A at 48a-49a; Dunagin App. at 59. In reality, the challenged laws

effectively restrict the primary source of liquor advertising for the Mississippi market - the in-state advertisers. Evidence in the Lamar record demonstrates that the Lamar Petitioners alone provide advertising coverage for the entire state. Lamar R. at 231-620. Thus, if the advertising laws were removed, liquor advertising would indeed "dramatically increase" in Mississippi.

Thirdly, the Court of Appeals concluded that "[i]f it were true that consumers were now being inundated with commercial information about liquor in contravention of the state's interest, the values behind the commercial speech doctrine would not be very much threatened," since the primary interest protected by the commercial speech doctrine are those of "the listener -

the consumer - in receiving information," not the interest of the speaker as in the idealogical speech. 718 F.2d at 751-752; Lamar App. A at 49a, 59a; Dunagin App. at 67-68. See, e.g., Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 563, 100 S.Ct. 2343, 2350, 65 L.Ed. 2d 341, 349 (1980) ("The First Amendment's concern for commercial speech is based on the informational function of advertising.").13/

The Fifth Circuit completed its Central Hudson analysis by finding that the State's liquor advertising laws "are no broader than necessary to pursue its

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13/ The Petitioners improperly rely on Bigelow v. Virginia, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed. 2d 600 (1975), to support an argument that the First Amendment supports the newspaper Petitioners' alleged com-

goal of preventing the artificial stimulation and promotion of liquor sales and consumption." 718 F.2d at 751; Lamar App. A at 50a; Dunagin App. at 61. Contrary to the argument at page 14 of the Dunagin Petition, the Fifth Circuit reasoned that "a less restrictive time, place and manner restriction, such as a

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mercial advertising rights. Lamar Petition at 16; Dunagin Petition at 17. In Bigelow, this Court's primary First Amendment concern was directed at "national and interstate newspapers," id. at 828, 829, 95 S.Ct. at 2236, 44 L.Ed. 2d at 615, 616, advertising out-of-state abortion services, an "activity with which ... the state could not interfere." Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 760, 96 S.Ct. 1817, 1825, 48 L.Ed. 2d 346, 357 (1976). In contrast to Bigelow, the instant cases concern restrictions on in-state media advertisers of liquor, over which the State has extensive power.

disclaimer warning of the dangers of alcohol," would not be effective. The Court correctly reasoned that the State's concern "is that advertising will unduly promote alcohol consumption despite known dangers" and "not that the public is unaware of the dangers of alcohol." 718 F.2d at 751; Lamar App. A at 51a-53a; Dunagin App. at 62-64.

This analysis by the Fifth Cirtcuit followed that of Metromedia in which this Court reasoned that "the most direct and perhaps the only effective approach to solving the problems [billboards] create is to prohibit them." Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 508, 101 S.Ct. 2882, 2893, 69 L.Ed. 2d 800, 815 (1981).

As just demonstrated, the Fifth

Circuit properly applied the contested elements of the Central Hudson test to the facts of these cases, although this examination is not a proper ground for certiorari review by this Court.14/ Clearly, the Fifth Circuit's decision to uphold the constitutionality of the Mississippi liquor advertising laws under the Central Hudson standard does not merit this Court's review since the

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14/ A discussion of the argument at pages 18 and 19 of the Dunagin Petition that the Misissippi liquor advertising laws were unconstitutionally applied to impede the advertisement of beer by the Dunagin Petitioners, which is without merit, is beyond the purpose of this Brief. This contention, even if valid, would not be a proper question for review by this Court since it is "episodic" and relates solely to the interests of the parties. See Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74, 75 S.Ct. 614, 616, 99 L.Ed. 897, 901 (1955).

decision is not in conflict with this Court's decisions and does not present any substantial federal question.

II. Contrary to the Lamar Petitioners' Contention, the Fifth Circuit Did Not Deny Them Standing to Assert an Equal Protection Challenge and Followed the Decisions of this Court in Refusing to Adopt a Strict Scrutiny Standard of Review for Commercial Speech Under the Equal Protection Clause

The Lamar Petitioners also argued that the Fifth Circuit has denied "standing [to] media businesses to challenge restrictions on commercial speech on equal protection grounds in conflict with the reasoning of opinions of this Court." Lamar Petition at 17, 21. Again, the Lamar Petitioners are refuted by the express language of the en banc decision. Citing and con-

sistent with Metromedia, which indicates that advertisers have standing to challenge advertising restrictions, the Court of Appeals clearly stated: "We do not mean to suggest that media advertisers lack standing to challenge commercial speech regulations." 718 F.2d at 752; Lamar App. A at 57a; Dunagin App. at 68. Thus, again these Petitioners present no viable question for review. Additionally, this question of standing would concern primarily the interests of the parties and would not constitute a proper issue for this Court's review.

The Lamar Petitioners are actually requesting this Court to create new constitutional law by adopting a strict scrutiny standard for commercial speech under the Equal Protection

Clause.15/ In fact, the Lamar Petitioners ask this Court to apply the strict scrutiny analysis even when it is found that no First Amendment commercial speech rights have been violated. These contentions are contrary to this Court's prior equal protection decisions. Furthermore, no commercial speech decisions of this Court have utilized the strict scrutiny standard under the Equal Protection Clause as confirmed by the Lamar Petitioners' improper reliance on decisions involving non-commercial, ideological speech to support this invalid argument. Lamar Petition, at 19, n.19. Petitioners' contentions certainly do not present a conflict or

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15/ The Dunagin Petitioners have not raised an equal protection issue in their Petition to this Court.

substantial federal question which merits review.

The crux of the Lamar Petitioners' erroneous argument is that advertising is entitled to strict scrutiny review since, as commercial speech, advertising is a "fundamental right." Lamar Petition at 20. This argument is contrary to the consistent position of this Court that only ideological speech is a "fundamental right" under the First Amendment. For example, in Metromedia, this Court stated that commercial speech is entitled to only "a limited measure of protection, commensurate with its subordinate position in the scope of First Amendment values" and that "[t]he difference between commercial price and product advertising and ideological communication permits regulation of the

former that the First Amendment would not tolerate with respect to the latter." Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507, 101 S.Ct. 2882, 2892, 69 L.Ed. 2d 800, 815 (1981). Accord, e.g., Bolger v. Youngs Drug Products Corp., ___ U.S. ___, 103 S.Ct. 2875, 2879, 77 L.Ed. 2d 469, 476 (1983). (Due to the "commonsense distinction" between commercial speech and other forms of speech, "the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression.") One reason for this "commonsense distinction," as explained by the Fifth Circuit, is that commercial speech advances only the economic interest of the speaker whereas idealogical speech advances primarily its speaker's "exposition of ideas,"

which is at the heart of First Amendment protection. The primary interests protected by commercial speech "are those of the listener - the consumer - in receiving information." 718 F.2d at 752; Lamar App. A at 56a; Dunagin App. at 67-68. The Dunagin Petitioners admit this fact at page 6 of their Petition.

The Lamar Petitioners are also wrong to suggest that the challenged liquor advertising laws may be held constitutional under the First Amendment and still be entitled to strict scrutiny review under the Equal Protection Clause. If the First Amendment is not violated, there could not possibly be any "fundamental right" which would trigger strict scrutiny. In fact, since the challenged laws are constituional under the First Amendment, they are

constitutional under the Equal Protection Clause because "they had already been found to represent the promotion of governmental values which override the individual interest in exercising their specific right." Nowak, Rotunda & Young, Handbook on Constitutional Law 676 (1978).

Additionally, the in-state advertisers and out-of-state advertisers are not "similarly situated groups" as the Lamar Petitioners also incorrectly argue. Lamar Petition at 18, n.18. The plain fact is that these groups are not similarly situated since liquor advertisements originating outside of Mississippi are beyond the State's control, both legally and as a practical matter, as the Fifth Circuit states:

> We think it exceedingly unlikely that the state could block, jam, or otherwise ban all magazines, newspapers, cable signals and radio and television broadcasts originating from other states that contain liquor advertisements, as a practical manner, and in the face of the Commerce Clause, the Supremacy Clause and the First Amendment.

718 F.2d at 753; Lamar App. A at 59a-60a; Dunagin App. at 71-72. See Packer Corp. v. Utah, 285 U.S. 105, 110, 52 S.Ct. 273, 274-275, 76 L.Ed. 643, 647 (1932). Recognition of this common sense fact is the basis for the solely intrastate restrictions on liquor advertising in Mississippi.

Under the applicable rational basis standard of review, the Fifth Circuit properly found that Mississippi has a legitimate interest in controlling liquor advertising and that "the state could have rationally concluded that

local advertising was the promotion of intoxicating liquor that was susceptible to regulation." 718 F.2d at 753; Lamar App. A. at 61a; Dunagin App. at 73. Thus, the Lamar Petitioners present no questions concerning the Equal Protection Clause that merit this Court's review.

III. The Granting of Certiorari to Review Capital Cities Cable, Inc. v. Crisp, No. 82-1795, Does Not Support the Granting of Certiorari to Review the Instant Cases.

This Court recently granted certiorari to review a decision of the United States Court of Appeals for the Tenth Circuit that concerns the constitutionality of Oklahoma liquor advertising restrictions on cable television advertising, Capital Cities Cable, Inc. v. Crisp, No. 82-1795.

The granting of certiorari in

Capital Cities Cable should not affect this Court's decision to grant or deny certiorari in these cases.16/ Capital Cities Cable is distinguishable from Lamar and Dunagin since it concerns restrictions on cable television under a regulatory scheme which bans in-state and out-of-state liquor advertisements. Furthermore, the review by this Court focuses on a conflict between Oklahoma's authority to ban wine advertisements on cable television and federal control of cable television advertising under federal statutes and Federal Communication Commission regulations. In fact, this Court specifically directed the parties in Capital Cities

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16/ The decision that is being reviewed is Oklahoma Telecasters Association v. Crisp, 699 F.2d 490 (10th Cir. 1983).

Cable to brief and argue this federal-state regulatory conflict in its October 3, 1983 order granting a writ of certiorari:

> [T]he parties are directed to brief and argue the following question: Whether the state's regulation of liquor advertising, as applied to out-of-state broadcast signals, is valid in light of existing federal regulation of cable broadcasting.

In contrast to Oklahoma, Mississippi's intrastate liquor advertising ban does not restrict liquor advertising on cable television or any other out-of-state media. As pointed out by the Fifth Circuit in its en banc decision: "The state has ... interpreted federal regulations to prohibit the state from interrupting or deleting wine commercials from cable television transmission sent from out-

side the state. See, 47 C.F.R. 76.55 (1982)." 718 F.2d at 741; Lamar App. A at 11a; Dunagin App. at 16. Thus, contrary to the statement at page 20 of the Dunagin Petition, the granting of a writ of certiorari in Capital Cities Cable does not support the granting of certiorari in these cases.

IV. Conclusion

As this Brief has demonstrated, the Lamar and Dunagin Petitioners present no conflicts with this Court's decisions and no important constitutional issues which merit review by this Court. Thus, particularly in light of this Court's "duty to avoid decisions on constitutional issues unless avoidance becomes evasion," 17/ this Court should deny the

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17/ Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74, 75 S.Ct. 614, 617, 99 L.Ed. 897, 901 (1955).

Petitions "for want of a substantial federal question," just as this Court similarly dismissed a liquor advertiser's challenge to a state ban on advertising of liquor price and price advantage by the drink in Queensgate Investment Co. v. Liquor Control Commission, 69 Ohio St. 2d 361, 433 N.E.2d 138, appeal dismissed, _____ U.S. _____, 103 S.Ct. 31, 74 L.Ed. 2d 45 (1982).

Respectfully submitted,

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Dated: April 9, 1984

CERTIFICATE OF SERVICE

I, JOHN E. MILNER, one of the counsel for Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 9th day of April, 1984, I served copies of the foregoing Respondents' Brief in Opposition on Petitioners by mailing three copies of said document by first class United States mail, in duly addressed envelopes, with postage prepaid, to each of the following attorneys for Petitioners:

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